Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PADDOCK PUBLICATIONS, INC.,

Petitioner,

v.

CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by creating an unprecedented rule of *per se* legality under Section 1 of the Sherman Act for vertical exclusive licensing contracts?

2. Whether the Court of Appeals' decision conflicts with decisions of this Court and other Circuits applying the Rule of Reason to vertical contracts?

3. Whether the Court of Appeals erred by holding that this Court's decision in *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), is no longer valid authority and does not apply to this case?

4. Whether the Court of Appeals erred by affirming dismissal under Rule 12(b)(6), F.R.Civ.P., on the basis of factual suppositions that directly contradict the allegations of the complaint and the record evidence developed during discovery?

PARTIES TO THIS PROCEEDING

The caption of this case contains the names of all the parties to this proceeding. Petitioner Paddock Publications, Inc. does not have a parent corporation or any subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Paddock Publications, Inc. ("Paddock") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The panel opinion of the Court of Appeals (App. 12) is reported at 103 F.3d 42 (7th Cir. 1996). The order of the Court of Appeals (App. 13) denying the petition for rehearing and suggestion of rehearing en banc is unreported. The two opinions of the District Court (App. 61-89, 90-92) and the Magistrate Judge's Report and Recommendation (App. 14-60) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1996. A timely petition for rehearing and suggestion of rehearing en banc was denied on January 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . .

STATEMENT OF THE CASE

Paddock, the publisher of a daily newspaper, the Daily Herald, in Chicago's northwest suburbs, brought this injunctive action under the federal antitrust laws to break the exclusive stranglehold that its competitors, the Chicago Tribune and Chicago Sun-Times, have on the nation's leading news services and features in the Chicago newspaper market. The Tribune and Sun-Times have long dominated the sale of newspapers in the Chicago area and use that market power to demand that the New York Times News Service ("NYT News Service") and the Los Angeles Times/Washington Post News Service ("LAT/WP News Service") and all the leading feature syndicators give them exclusive licenses that last as long as the Tribune and Sun-Times want them. Paddock cannot obtain news services and features of the quality and popularity that would enable it to compete with the Tribune and Sun-Times. (App. 94-99, 102-106, 109-111, 115-120, 123-130, 132-136, 159-160, 194-196, 241-242.)

The Tribune and Sun-Times require these exclusive licenses for the specific purpose of blocking Paddock and other smaller newspapers from obtaining vital resources that are available to hundreds of newspapers across the country. The effect on competition is intended and clear: Paddock and other papers cannot mount a challenge to the Tribune's and Sun-Times' dominance because most newspaper readers insist on the comprehensive national and international coverage that the NYT News Service and LAT/WP News Services uniquely provide, as well as the popular comics and columns that have national prominence. The Tribune and Sun-Times have concededly enforced their exclusive licenses to prevent their

readers from switching to other papers, including the Daily Herald. Consequently, Paddock has not been able to expand its circulation significantly outside the northwest suburbs where the Daily Herald originated. Consumers in the Chicago area are denied the choice, quality, and lower prices that greater competition would provide. (App. 104-106, 109-111, 126-130, 132-136, 145-147, 152, 160-161, 254, 259.)

The exclusive licenses provide no benefits to competition or consumers. If other newspapers had access to the vital news services and features—which the Tribune and Sun-Times did not create or develop but buy off the shelf—the quality of the Tribune and Sun-Times would not suffer because they could still offer the same news service articles and features that they now provide. However, without these restrictive exclusive arrangements, Paddock and other newspaper publishers could offer better products to consumers. (App. 106-107, 110-111, 130, 134-136, 145-147, 153, 156-158, 164-165, 173-174, 196.)

Decisions Below

The Magistrate Judge's Recommendation. The Magistrate Judge concluded that Paddock's claims under Section 1 of the Sherman Act should be dismissed because the antitrust laws do not reach separate but parallel exclusive contracts entered into by the dominant firms in a market even if in the aggregate they injure competition. (App. 58-60.) However, the Magistrate Judge also concluded that the defendants' alternative summary judgment motion should be denied because the facts are disputed with respect to the exclusive licenses' effects on competition and the defendants' contentions that the

exclusives are justified. (App. 21, 24-25, 43, 46-53.) The Magistrate Judge rejected the defendants' contention that the exclusive licenses are merely distribution contracts through which the newspapers resell the news service material and features to consumers. The Magistrate Judge concluded instead that "[r]educing the number of newspapers implicates consumer welfare in a way in which reducing the number of distributors of a product would not." (App. 37-40.)

District Court Dismissal. The District Court concluded that Section 1 of the Sherman Act cannot be violated by the collective anticompetitive effect of two dominant firms' exclusive contracts if those firms have not conspired. The Court refused to follow *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), even though this Court held that four non-conspiring firms' separate exclusive license contracts violated the antitrust laws because of their aggregate anticompetitive effects. (App. 68-78.) The District Court did not consider Paddock's claims under the Rule of Reason. (App. 85 n.13.)

The District Court granted Paddock leave to amend, but dismissed the Amended Complaint on the ground that Paddock was still attempting to "manufacture an antitrust violation" by combining the Tribune's and Sun-Times' exclusive licenses to establish a restraint of trade. (App. 91-92.)

The Court of Appeals' Decision. Paddock appealed under 28 U.S.C. § 1291 from the final judgment dismissing its case under Rule 12(b)(6). The Court of Appeals affirmed the dismissal. The Seventh Circuit held, as a matter of law, that there could be no injury to competi-

tion in this case because the defendant news services and features syndicators had entered into the exclusive contracts with the Tribune and Sun-Times independently to maximize their profits. (App. 3-6.) In the Court's view, the exclusive licenses helped maintain vigorous competition in the Chicago newspaper market; there were numerous other news services and features available to the Daily Herald; and the exclusive licenses were open on short notice to rebidding by the Tribune's and Sun-Times' competitors. (App. 5, 6, 12.) The Court did not mention the complaint's well-founded allegations that the exclusive licenses had harmed competition and consumers in the Chicago newspaper market. The Court rejected Paddock's reliance on *Motion Picture Advertising* because that decision was deemed to be based on an outdated mode of antitrust analysis. The Seventh Circuit also found *Motion Picture Advertising* to be limited to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and Justice Douglas' statement in the majority opinion that the Sherman Act had been violated was characterized as "unreasoned dictum." (App. 7-11.)

Paddock sought rehearing en banc because the panel's opinion ignored the Rule of Reason and adopted an unprecedented rule of *per se* legality on factual assumptions contrary to the complaint's allegations. Rehearing was denied without comment. (App. 13.)

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT ADOPTED AN UNPRECEDENTED RULE OF PER SE LEGALITY FOR EXCLUSIVE VERTICAL SUPPLY CONTRACTS

Paddock has alleged all the elements of a violation of the Rule of Reason: exclusive contracts between newspapers with market power and suppliers that block those newspapers' competitors from access to vital supplies, thereby seriously impeding competition and harming consumers by denying them the benefits of greater product choice and quality and lower prices. Nevertheless, the Court of Appeals affirmed dismissal under Rule 12(b)(6), holding that under no set of facts could such licenses violate Section 1 of the Sherman Act. This result overturns decades of antitrust precedent.

The Seventh Circuit did not even mention the Rule of Reason, which this Court held in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977), governs claims under Section 1 of the Sherman Act against vertical arrangements. Judge Easterbrook, the author of the Seventh Circuit's opinion, has long criticized the Rule of Reason because it prescribes a supposedly "empty" balancing test of anticompetitive and pro-competitive factors. Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex.L.Rev. 1, 11-14 (1984).

Judge Easterbrook has proposed that courts adopt certain presumptions, or "filters," to determine whether particular antitrust claims should be dismissed. *Id.* at 14-15. The rationale for these filters is skepticism that litigation can reach correct economic results: ". . . it is fantastic to suppose that judges and juries could make

such an evaluation" of the costs and benefits of a particular practice. *Id.* at 11. The result is rough justice: "If presumptions let some socially undesirable practices escape, the cost is bearable." *Id.* at 14.

These views have now become Seventh Circuit law, and they are not limited to the vertical exclusive licenses specifically at issue in this case. All vertical arrangements are deemed to be "usually procompetitive." Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 168 (1984). "They are all the same." *Id.* at 135.

The Seventh Circuit's holding of *per se* legality for supposedly profit-maximizing vertical contracts is unprecedented.[1] "Mere invocation of possible pro-competitive purposes will not suffice to legalize a restraint under the rule of reason." *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1573 n. 22 (11th Cir. 1983). As this Court recently explained:

> Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record."

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[1] The Seventh Circuit cited no authority for its holding that profit-maximizing is a defense to an antitrust claim. *See United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966) (fact that each party acted in pursuit of its "lawful interest" not a defense under Section 1). All restraints of trade are designed to make more money for the parties entering into them.

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-467 (1992) (*quoting Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 579 (1925)).

Such a fundamental change in antitrust law should not be allowed without a full hearing in this Court.

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

This Court has never departed from its holding in *Sylvania* that non-price vertical arrangements are to be judged under the Rule of Reason. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988). Other Circuits continue to apply the Rule of Reason to vertical cases like this one. *See Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996); *Retina Associates, P.A. v. Southern Baptist Hospital*, 105 F.3d 1376 (11th Cir. 1997); *American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 789 (9th Cir. 1996); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595-597 (1st Cir. 1993).

In *Orson*, the plaintiff movie theater challenged exclusive licenses held by a competing theater to a leading movie distributor's films. The Third Circuit explained the standard approach to deciding such cases under Section 1 of the Sherman Act:

> Whether a business arrangement unreasonably restrains trade is determined by the courts, on a case-by-case basis, using a rule of reason which considers all relevant factors in examining a defendant's purpose in implementing the restraint and the restraint's effect on competition.

Orson at 1367. The Rule of Reason is applied through shifts in the burden of proof as evidence is presented. Initially, the plaintiff bears the burden of proving either actual anticompetitive effects or its surrogate, market power. If the plaintiff makes that showing, the burden shifts to the defense to establish sufficient pro-competitive effects. The plaintiff may then rebut by demonstrating that the restraint is not "reasonably necessary" to achieve those pro-competitive effects. *Id.* at 1367-1368. *See also* VII Phillip E. Areeda, Antitrust Law ("Areeda") ¶ 1507b (1986).

If the Rule of Reason were applied in this case as it was in *Orson*, Paddock would be entitled to a trial, not dismissal under Rule 12(b)(6). Since Paddock has sufficiently alleged the elements of a Rule of Reason violation, defendants' motion to dismiss should have been denied.[2] Unlike the plaintiff in *Orson*, 79 F.3d at 1372, Paddock has submitted substantial evidence that it does not have access to "alternative sources of supply" that would enable it to compete effectively with the Tribune and Sun-Times. Indeed, the Magistrate Judge concluded that Paddock's evidence created disputed factual issues with respect to the justifications for the exclusives

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[2] The Seventh Circuit's facile conclusion (App. 5) that this case should be viewed as an "essential facility" case without an essential facility does not excuse its failure to apply the Rule of Reason. Paddock never made a claim under the essential facility doctrine, but has always claimed that the exclusive licenses violate the Rule of Reason. "[T]he same competitive practice may be reviewed under several different rubrics and a plaintiff may prevail by establishing a claim under any one of them." *U.S. Healthcare, Inc.*, 986 F.2d at 593.

offered by the defendants, thereby defeating the defendants' alternative motion for summary judgment. (App. 21, 24-25, 43, 46-53.) The Court of Appeals simply rewrote the record to fit the economic assumptions for its rule of *per se* legality.

The Seventh Circuit's substitution of a *per se* rule of legality for the Rule of Reason in cases involving vertical supply arrangements under Section 1 of the Sherman Act is unwarranted, in conflict with the decisions of this Court and other Circuits, and must be reversed.

III. THE SEVENTH CIRCUIT ERRED BY REFUSING TO FOLLOW THIS COURT'S DECISION IN *MOTION PICTURE ADVERTISING SERVICE*

In defending its new *per se* rule, the Seventh Circuit rejected this Court's decision in *Motion Picture Advertising Service Co.* The defendant in that case was found to have violated Section 1 of the Sherman Act because it and three other major firms together holding 75% of the market had, without conspiring, used similar exclusive-dealing contracts that substantially foreclosed competition by other firms. Characterizing *Motion Picture Advertising* as a "derelict" and "antique antitrust opinion," the Seventh Circuit discarded the statement in Justice Douglas' majority opinion that Section 1 was violated as "unreasoned dictum." (App. 9.) The Seventh Circuit departed from its own decisions requiring antitrust decisions of this Court to be followed even though there is some reason to question whether this Court would still view them as valid precedents. *See, e.g., Khan v. State*

Oil Co., 93 F.3d 1358, 1362-1364 (7th Cir. 1996), *cert. granted in part*, ___ U.S. ___, 117 S.Ct. 941 (1997).[3]

Motion Picture Advertising is not the "derelict" and "antitrust antique" depicted by the Seventh Circuit. While the Seventh Circuit criticized *Motion Picture Advertising* because the analysis in that case "depends on 'foreclosure' of sales to competitors without proof of injury to consumers" (App. 8), the "foreclosure" approach followed in *Motion Picture Advertising* is still good law. Justice O'Connor's concurring opinion in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984), used the same foreclosure approach as *Motion Picture Advertising*:

> Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their

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[3] The Seventh Circuit alternatively attempted to distinguish *Motion Picture Advertising* by relying on facts that are contrary to both Paddock's complaint and the record evidence: that this case involves exclusive distributorships rather than the type of exclusive dealing contracts at issue in *Motion Picture Advertising*, and that the contracts here are open for renegotiation and bidding on "short notice." (App. 12.) As demonstrated below, the exclusive licenses involved in this case are not distributorships but exclusive supply contracts, and the exclusive licenses will continue as long as the Tribune and Sun-Times want them. At the very least Paddock should have the opportunity to present evidence refuting these supposedly distinguishing facts.

> goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply. In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question—the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. (Emphasis added.)

The 1992 summary of antitrust law by the Antitrust Section of the American Bar Association, Antitrust Law Developments (3d ed. 1992) Vol. I, at 176-177 (footnotes omitted), also focuses on the extent of market foreclosure:

> If an arrangement is viewed as exclusive dealing, the courts and the Commission have considered a number of factors in applying a rule of reason analysis. Perhaps most important is the percentage of the market foreclosed. As the percentage of the market foreclosed rises beyond 20% to 30%, the probability that a violation will be found increases.

Market foreclosure created by exclusive supply contracts controlled by firms with market power prevents other competitors from entering the market or expanding their market penetration and thereby injures consumers. *See* VIII Areeda ¶ 1652c1 at 571-573 (describing anticompetitive effects in the "upstream" market of exclusive supply contracts held by dominant firm). In this case, consumers are hurt by having a restricted choice of

newspapers, by being deprived of the improvement in the quality of their papers that greater competition would inspire, and by paying higher prices for the limited number of papers available to them. Output is restricted and prices are increased, the hallmarks of anticompetitive effects and consumer injury. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99-100 (1984).

The Seventh Circuit also agreed with the District Court that, in the absence of a conspiracy between them, the Tribune's and Sun-Times' exclusive licenses could not properly be aggregated to assess their harmful effects on competition. (App. 8.) To the contrary, this Court in *Motion Picture Advertising*, in determining that the defendant had violated the Sherman Act, considered the fact that the other three major firms in the market used similar exclusive contracts even though there was no contention that the firms had conspired. The Seventh Circuit's decision to ignore industry practices demonstrates again its aversion to the Rule of Reason in which all such market facts must be evaluated. The law, at least prior to the Seventh Circuit's decision, was that:

> The character of the market(s) in which the parties operate, their market shares, and the behavior and shares of their rivals determine whether a possible threat to competition has or will come to pass and whether any such impact is likely to be significant.

VII Areeda ¶ 1503b, at 376.

This Court explained in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), that vertical arrangements may violate Section 1 under the Rule of Reason even if they do not "threaten[ ] monopolization."

The Seventh Circuit's rejection of *Motion Picture Advertising*, however, entails that vertical arrangements violate the Sherman Act only if there is a horizontal agreement between the firms using the same practice or one of the firms achieves a monopoly. In other words, the Rule of Reason for vertical arrangements becomes a dead letter. Rather than merely refusing to follow a supposedly out-dated precedent, the Seventh Circuit's decision would invalidate an entire body of antitrust law judging vertical arrangements under the Rule of Reason.

IV. THE SEVENTH CIRCUIT VIOLATED RULE 12(b)(6) BY RESTING ITS DECISION ON FACTUAL PRESUPPOSITIONS AT ODDS WITH THE CRUCIAL ALLEGATIONS OF THE COMPLAINT

The Seventh Circuit's ultimate holding is that vertical exclusive licenses are *per se* legal; the facts of a particular case do not matter. To justify that conclusion, however, the Seventh Circuit ignored the allegations of Paddock's complaints and relied on factual presuppositions unsupported by the record. Indeed, the Seventh Circuit's opinion is contradicted by the evidence submitted by Paddock in opposition to the defendants' alternative summary judgment motion. The decision below flouts the liberal federal civil pleading rules, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and the longstanding practice under Rule 12(b)(6) of assuming the truth of the complaint's allegations in deciding whether a valid cause of action is stated. "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

The Seventh Circuit's factual presuppositions that conflict with the record are graphically portrayed by the table on the next two pages and fully documented in the following pages. Such violent revision of the record cannot be countenanced under Rule 12(b)(6).

	Court of Appeals' Factual Assumptions	Paddock Complaint Allegations	Evidence
A.	The exclusive licenses create a "vigorous market" that would be damaged if competing papers ran the same stories and features. (App. 6.)	The exclusive licenses are barriers preventing new papers from entering the market and the Daily Herald from expanding its circulation. (App. 95, 101, 110, 116, 128, 134-136.)	Tribune editor testifies that decline in number of competitors has created less incentive for Tribune to use its own original material. (App. 250-251.) Magistrate Judge concludes that end of exclusives would enhance competition with each newspaper using its own staff's work. (App. 47-48.)
B.	Many quality comics and other news services are available to Paddock. (App. 3, 5.)	Paddock does not have access to other news services and features of comparable quality and popularity that would enable it to compete with the Tribune and Sun-Times. (App. 95, 102-105, 109-110, 116, 123-128, 133.)	Paddock's journalism expert concludes that there are no available news services and features comparable to those controlled exclusively by the Tribune and Sun-Times. (App. 194-196.)
C.	Seventh Circuit stresses Paddock's concession that the news services	Paddock makes no such concession and instead alleges that	Magistrate Judge finds facts disputed on defendants' contention

	and features syndicators use exclusives because "it is the most profitable way to do business." (App. 4.)	Tribune's and Sun-Times' market power enable them to demand exclusivity. (App. 101, 106-107, 112, 122-123, 126, 130.)	that exclusives allow licensing revenues to be maximized. (App. 50-53.) Syndicators have made at least as much money in markets where exclusivity has been broken. (App. 203-207, 221-227.)
D.	Seventh Circuit concludes that licenses are open on short notice to highest bidder. (App. 12.)	Paddock alleges that the exclusives last as long as the Tribune and Sun-Times want them. (App. 104-105, 127.)	Syndication witnesses testify that the licenses are not put up for renegotiation or bidding when formal terms expire. (App. 202, 210-213, 216-220, 228-230, 243-249.) NYT News Service President testifies it would not license Paddock at any fee. (App. 271.)
E.	Seventh Circuit depicts Tribune and Sun-Times as mere distributors of news service material and features. (App. 9-10.)	Paddock alleges that the news services and features are vital resources that newspapers use in creating their distinctive products. (App. 95, 100, 105, 110-111, 121, 129.)	Magistrate Judge rejects defendants' contention that newspapers are mere distributors of the licensed material. (App. 35-40.)

A. The Supposed Creation of a "Vigorous Market" through the Exclusives. The Seventh Circuit justified dismissal of Paddock's case by stating that the exclusive licenses in question create a "vigorous market" that would be damaged if competing newspapers could publish the same stories and features. (App. 6.) But Paddock has alleged that the exclusive licenses are barriers preventing new papers from entering the market and the Daily Herald from expanding its circulation. (App. 95, 101, 110, 116, 128, 134-136.)

The Seventh Circuit's depiction of a "vigorous market" in which exclusives provide incentives to originality is contrary to the evidence of record. A Tribune editor testified that, with the decline of competition in the Chicago newspaper market, the Tribune's desire to use its own staff-generated material whenever possible has "eroded" and it now uses more Associated Press stories that are available to all papers:

> I think that in the era when there were four, six or eight newspapers in Chicago, there was great—people placed great stock in having a maximum amount of staff-generated copy. But as I said, I don't think that that's a valid model any more. [App. 250-251.]

The Magistrate Judge made the same point in concluding that it is "pure speculation" whether exclusive licensing promotes competition. (App. 50.) If there were no exclusives, the newspapers would still compete through their "selection and editing" of the licensed material, and competition would be "enhanced" as the newspapers placed greater stress on their own original work. (App. 47-48.)

The Magistrate Judge's finding of possible injury to competition and consumer welfare is also diametrically opposed to the Seventh Circuit's opinion:

> . . . Paddock has alleged an impediment to competition; any smaller third paper attempting to compete in the Chicago metropolitan market with the Chicago Tribune and Chicago Sun-Times will come up against the same obstacle of exclusive licenses. . . .
>
> . . . [D]rawing reasonable inferences in Paddock's favor, it appears that exclusive licenses are a significant barrier to entry and may serve no useful purpose other than maintaining the duopoly in the Chicago market. [App. 24-25.]

What the Seventh Circuit mischaracterized as a "vigorous market" is in fact a duopoly protected by high market barriers to insure that competition will never be vigorous.

B. The Supposed Availability of Quality News Services and Features to Paddock. The Seventh Circuit cited Paddock's supposed "concession" that the Associated Press, Reuters, and "many quality comics" are available to it and suggested that Paddock merely wants the "best" material. (App. 3, 5.) To the contrary, Paddock has alleged and shown that none of the available news services "is a reasonably effective substitute" for the leading news services, the NYT News Service and the LAT/WP News Service, which are controlled exclusively in this market by the Tribune and Sun-Times. (App. 95, 102, 109-110, 116, 123-124, 133, 194-195.) Paddock has also alleged and shown that the available features are of no use to it in competing with the Tribune and Sun-

Times. (App. 95, 103-104, 109-110, 116, 125-126, 133, 195-196.)

C. The Supposed Profit-Maximizing by Defendant News Services and Syndicators. The Seventh Circuit stated that Paddock concedes that each defendant news service and syndicator uses exclusive licenses because "it is the most profitable way to do business." (App. 4.) Paddock made no such concession and contends to the contrary that the dominant papers have used their market power to demand exclusivity. (App. 101, 106-107, 112, 122-123, 126, 130.) The record evidence shows that the news services and syndicators would earn at least as much if they could license their products non-exclusively to other papers in the same market, and there is no evidence that the Tribune and Sun-Times would abandon popular features if they were licensed non-exclusively. For example, when the San Francisco Chronicle lost exclusivity on certain features, it continued to license those features. The fees it paid to defendant United Feature Syndicate were reduced, but United received fees from additional licensees that made it "roughly a wash." (App. 203-207.) When the Indianapolis Star lost its exclusivity to certain features, the Star continued to license those features and paid the same fees to the syndicator. However, the suburban paper that could now license the features also paid fees to the syndicator, which as a result received higher total fees without exclusivity. (App. 221-227.) In addition, Paddock's economics expert explained the possibility that the exclusives do not maximize the syndicators' profits. (App. 174-175.)

The Magistrate Judge found, contrary to the Seventh Circuit, that the facts are disputed on this issue:

"[A]lthough defendants have raised the justification of maximizing revenues, they have not shown the absence of a genuine issue of material fact. . . ." (App. 50-53.)

D. The Supposition that the Exclusive News Services and Features Are Open for Bidding on Short Notice. One of the key "facts" relied upon by the Seventh Circuit is that Paddock has never tried to out-bid the Tribune and Sun-Times for the leading news services and popular features and that Paddock could obtain them if it agreed to pay more than its competitors. As the Court below put it: "[S]omeone with a better offer can get or sell news on short notice." (App. 12.)

That statement is simply not true. Paddock has alleged that the exclusive licenses to the leading news services and most popular features "are automatically renewed, continue on a perpetual basis, and deny the Daily Herald the opportunity to obtain access to them." (App. 104-105, 127-128.) The evidence establishes that once an exclusive is granted to the Tribune or Sun-Times, that paper will hold that exclusive as long as it wants it.[4] The news services and syndicators do not put their licenses up for re-bidding or even renegotiation when the formal terms

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[4] The Daily Herald normally is not even offered the leading features. They are first offered to the Tribune and then, if the Tribune declines, to the Sun-Times. If both the Tribune and Sun-Times decline a feature, it is then offered to the remaining papers on a non-exclusive basis. If the feature becomes popular, the Tribune or the Sun-Times can still license it. (App. 126-127.) That was the case with the Daily Herald's only popular comic strip, "Dilbert." The Daily Herald licensed it after it was rejected by the Tribune and Sun-Times. Later the Tribune licensed it through an exclusive that blocks access to all papers except the Daily Herald.

of the licenses expire. (App. 202, 210-213, 216-220, 228-230, 243-249.) The president of the New York Times News Service was emphatic: It would not license the Daily Herald at any fee that Paddock would offer to pay. (App. 271.) Paddock has tried to obtain these news services and features, but has been rejected without any suggestion that they would be available if Paddock offered a higher fee than the existing licensees.[5] (App. 157.)

Contrary to the Seventh Circuit's opinion, the effect on competition of an exclusive contract cannot be determined as a matter of law based merely upon the licenses' boilerplate termination provisions. The specific effects of exclusivity must be assessed in each case. *See U.S. Healthcare*, 986 F.2d at 596. Here, Paddock has admissions that the licenses will last as long as the licensing newspaper wants them.

E. The Characterization of Newspapers as Mere Distributors of the News Service Stories and Syndicated Features. The Seventh Circuit adopted the defendants' contention that the Tribune and Sun-Times are simply distributors of the news service material and features that they exclusively license. (App. 9-10.) Paddock alleges instead that the news services and features syndicators provide important inputs that newspapers meld with their own "in-house" material to create a new product. (App. 95, 100, 105, 110-111, 121, 129.)

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[5] In any event, a plaintiff is not required to engage in futile efforts to deal with the alleged antitrust violators in order to state a claim. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 120 n. 15 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-700 (1962).

The District Court agreed with Paddock. The Magistrate Judge rejected the defendants' contention that newspapers are "distributors":

> [I]t is a distortion to speak of newspapers as "distributors" of news and features "manufactured" by the syndicators and news services. . . . Newspaper publishers are not simply resellers, but creators of products in their own right. While news services and syndicates provide important, perhaps necessary ingredients, each newspaper is the sum of its news services, its features, and its own reporting and commentary. [App. 37 (emphasis in original).]

The Tribune does not view itself as a New York Times distributor. The Tribune's editor responsible for acquiring news service and feature licenses stated that the Tribune's product is "the newspaper as a whole"; it does not sell individual features to the public: "They are part of the product." (App. 237.)[6]

Rule 12(b)(6) does not permit the Seventh Circuit to substitute its version of the facts to suit the preconceptions of its economic theory.[7] The Seventh Circuit also

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[6] In fact, the Tribune uses little of the large volume of material provided by the NYT News Service. (See the summary of the survey of the Tribune's news sources by Paddock's counsel at App. 267.) The apparent purpose of the Tribune's exclusive license to that material is to block the Daily Herald from using it.

[7] In addition to the factual presuppositions discussed above, the Seventh Circuit also drew on supposed factual analogies from the automobile, motion picture, and television industries that have no source in the record of this case. (App. 5-6, 11-12.)

failed to honor the cautionary antitrust principle of not creating a new *per se* rule until the effects on competition of the business practice in question are fully understood. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 24 (1979); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

CONCLUSION

The Seventh Circuit has created a new doctrine of *per se* legality for vertical arrangements that will stifle the development of new competition in the newspaper industry as well as other markets in which dominant firms use exclusive contracts to block their competitors from vital supplies. The Seventh Circuit's decision marks a 180-degree turn in antitrust law supplanting the Rule of Reason and this Court's focus on the facts of each case with the doctrine of one school of economics. Paddock's allegations and evidence have never received a hearing to which they are entitled under Rule 12(b)(6) and the law repeatedly applied by this Court.

Therefore, Paddock asks the Court to grant this Petition, set this case for full briefing and argument, and reverse the Seventh Circuit's decision.

Respectfully submitted,

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Dated: April 16, 1997

FILED

961669 APR 18 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PADDOCK PUBLICATIONS, INC.,

Petitioner,

v.

CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2058

PADDOCK PUBLICATIONS, INC., doing business as The Daily Herald,

Plaintiff-Appellant,

v.

CHICAGO TRIBUNE COMPANY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 7493—**David H. Coar,** *Judge.*

ARGUED NOVEMBER 8, 1996—DECIDED DECEMBER 16, 1996

Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Newspapers' content has many sources. To the work of their own staff, papers add dispatches from syndicated news services such as the Associated Press and Reuters that station reporters or stringers across the globe. Leading newspapers such as the *New York Times*, the *Los Angeles Times*, the *Washington Post*, the *Chicago Tribune*, and the *Wall Street Journal* have set up supplemental news services. The New York Times News Service carries that paper's

stories; the Los Angeles Times/Washington Post News Service combines stories from those papers; the Knight-Ridder/Tribune Information Service pools stories from the *Tribune* and the Knight-Ridder chain's papers. Subscribers can reprint the originating paper's stories (and those of other papers that contribute to the supplemental service) in the subscribers' home markets. Cartoons, op-ed pieces, book reviews, chess columns, puzzles, and other features are available from syndicators such as United Press Syndicate, United Features Syndicate, King Features Syndicate, Creators Syndicate, and Tribune Media Services.

Supplemental news services and features syndicators offer exclusive contracts to subscribers in each metropolitan area. Because the *Chicago Tribune* subscribes to the New York Times News Service, stories from the *Times* are unavailable to the *Chicago Sun-Times* and smaller newspapers in the Chicago area; the *Sun-Times* subscribes to the Los Angeles Times/Washington Post News Service, which therefore is unavailable to the *Tribune* and smaller papers. News services and features syndicates charge by the circulation of the subscribing paper, and they therefore strive to sign up the largest paper in each market. Exclusivity is one valuable feature the service offers, for a paper with exclusive rights to a service or feature is both more attractive to readers and more distinctive from its rivals. When selling to smaller papers, however, the supplemental news services and features syndicates generally do not offer exclusivity—for they still hope to interest the larger, and therefore more lucrative, papers in the market (which can sign up later with exclusive rights against all but the original customer).

As a rule, the larger papers subscribe to the more popular services and features; or perhaps it is the very fact that a feature runs in a market's larger papers that makes it "more popular." Causation need not concern us. No matter which way it runs, smaller papers perceive that they get the crumbs. This suit, by the *Daily Herald*, the number three general-interest paper in the Chicago area (with 6.7% of average weekly readership), contends that the pattern of exclusive distribution rights violates §1 of the Sherman Antitrust Act, 15 U.S.C. §1, by making it harder for small papers to grow. Like the district court, we assume without deciding that "general-interest-newspaper readership in the Chicago SMSA" is a market. According to the complaint, the *Chicago Tribune* and the *Chicago Sun-Times* have locked up the "most popular" or "best" supplemental services and features, injuring consumers by frustrating competition. (We assume that "the best" services and features can constitute a market, although it sounds more like an aesthetic judgment; no one would say that "the best film of 1996" has a monopoly of any market just because there can be only one "best" film.) The *Daily Herald* views the Knight-Ridder/Tribune Information Service as a distant third to the supplemental news services the *Tribune* and *Sun-Times* use, and even it is unavailable because the *Tribune* will not license its stories to a competitor in its home market. The *Herald* concedes that the Associated Press, Reuters, and many quality comics and features are available to it (for example, it publishes *Dilbert*, one of today's most-followed comic strips) but insists that the best ones are committed to its larger rivals. After assuming that all of the *Herald*'s allegations are true, the district court dismissed the complaint for failure to state a

claim on which relief may be granted. 1995-2 Trade Cas. ¶71,255.

The *Herald* does not contend that the *Tribune* has conspired with the *Sun-Times* to bring about this state of affairs. Compare *Associated Press v. United States*, 326 U.S. 1 (1945) (holding that the Associated Press, a consortium of newspapers, must eliminate an exclusivity feature that could be traced to agreement among horizontal rivals). Nor does it contend that the supplemental news services and features syndicators (or their contributing papers and authors) have agreed among themselves. It concedes that each has adopted its method of doing business independently; they take the same approach to distribution because each has discovered that it is the most profitable way to do business. All of the contracts between services and newspapers are terminable at will or on short notice (usually 30 days, although some features require a year's notice). Instead of seeing whether money could persuade a supplemental news service to cut off one of the larger papers—the *Herald* has never tried to outbid the *Tribune* or *Sun-Times*, either on a total compensation basis or a per-subscriber basis—it asked the district court to declare that the antitrust laws entitle it to receive the leading supplemental news services and features without regard to the contractual exclusivity that the *Tribune* and *Sun-Times* currently enjoy. At times the *Herald* suggests that it would be happy with rights to articles from the *New York Times*, *Los Angeles Times*, and *Washington Post* that the *Tribune* and *Sun-Times* do not reprint; "there's plenty for all" is a theme of its brief. But this won't work well for news (must the *Tribune* give the *Herald* advance notice of its contents?) or at all for features, which are sold one

at a time. For example, King Features Syndicate does not sell its entire portfolio to one paper per market; the *Tribune*, *Sun-Times*, and *Herald* each publish some of its comics and columns. So the *Herald* necessarily argues that it is entitled to run *Peanuts* and *Dick Tracy* even though these comic strips also appear in the *Tribune*.

This is fundamentally an "essential facilities" claim—but without any essential facility. There are three supplemental news services that the *Herald* is willing to acknowledge as major competitors (and others besides, though the *Herald* denigrates them). There are hundreds, if not thousands, of opinion and entertainment features; a newspaper deprived of access to the *New York Times* crosswords puzzles can find others, even if the *Times* has the best known one. Unlike *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912), the granddaddy of these cases, in which the Court held that a bottleneck facility that could not feasibly be duplicated must be shared among rivals, this case does not involve a single facility that monopolizes one level of production and creates a potential to extend the monopoly to others. We have, instead, competition at each level of production; no one can "take over" another level of production by withholding access from disfavored rivals. *Flip Side Productions, Inc. v. JAM Productions, Ltd.*, 843 F.2d 1024, 1032-34 (7th Cir. 1988), holds that the existence of three competing facilities not only means that none is an "essential facility" but also means that each of the three is entitled to sign an exclusive contract with a favored user. Other firms that want to enter the market can do so by competing at intervals for these contracts.

Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it

is common. Every year or two, General Motors, Ford, and Chrysler invite tire manufacturers to bid for exclusive rights to have their tires used in the manufacturers' cars. Exclusive contracts make the market hard to enter in mid-year but cannot stifle competition over the longer run, and competition of this kind drives down the price of tires, to the ultimate benefit of consumers. Just so in the news business—if smaller newspapers are willing to bid with cash rather than legal talent. In the meantime, exclusive stories and features help the newspapers differentiate themselves, the better to compete with one another. A market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one. And a market in which the creators of intellectual property (such as the *New York Times*) could not decide how best to market it for maximum profit would be a market with less (or less interesting) intellectual property created in the first place. No one can take the supply of well researched and written news as a given; legal rulings that diminish the incentive to find and explicate the news (by reducing the return from that business) have little to commend them.

In what way could the news services' practices harm consumers? Tacit collusion (economists' term for "shared monopoly") could be a source of monopoly profits and injury to consumers even if none of the stages of production is monopolized. Some distribution arrangements might be objectionable because they facilitate tacit collusion. But collusion, tacit or express, requires some horizontal cooperation, or at least forbearance from vigorous competition among rivals. See Herbert Hovenkamp, *Federal Antitrust Policy* §4.4 (1994). Compare Richard A. Posner, *Antitrust Law: An Economic Perspec-*

tive 42-77 (1976), with Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962). Although the newspaper market is concentrated on the readers' side, the inputs to newspaper production are unconcentrated and therefore do not facilitate tacit collusion in the more concentrated market. The New York Times News Service competes for column inches of ink not only with other supplemental news services but also with the Associated Press, Reuters, and the reporters of the subscribing papers. Markets here are less concentrated, and use fewer of the devices that facilitate oligopolistic interdependence, than the markets in *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984), where an antitrust claim was nonetheless rejected. The *Herald* does not argue that the practices at hand facilitate tacit collusion.

What the *Herald* does argue is that a mixture of fewness of firms, exclusive contracts, and relations between suppliers and users of news that endure despite short contract terms, hampers the growth of small rivals even though each market is competitive. Such an argument does not come within any of the economic approaches to tacit collusion—but it does, the *Herald* insists, come within the holding of *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). The *Herald* relies as well on *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (*Standard Stations*), and *United States v. Loew's Inc.*, 371 U.S. 38 (1962), but rightly treats *Motion Picture Advertising Service* as its best case.

Four companies signed approximately 75% of the nation's motion picture theaters to exclusive-dealing contracts for advertisements to be displayed along with the

films. Having signed with one supplier of ads, a theater could not display ads furnished by another. The Federal Trade Commission concluded that these arrangements, in the aggregate, stifled competition by firms that wanted to enter the business of furnishing advertising to theaters, and therefore violated §5 of the Federal Trade Commission Act, 15 U.S.C. §45: as the Supreme Court phrased the FTC's conclusion, "due to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States." 344 U.S. at 395. According to the *Herald*, the same kind of thing now has occurred in the news industry, making it equally appropriate to aggregate the market shares of the firms without proof of horizontal collaboration (for there was none in *Motion Picture Advertising Service*). The district court was not impressed, for the approach of *Motion Picture Advertising Service*—which depends on "foreclosure" of sales to competitors without proof of injury to consumers—reflects a bygone day in antitrust analysis. But the district court properly did not rely entirely on a belief that the opinion is a derelict. See *Khan v. State Oil Co.*, 93 F.3d 1358, 1362-64 (7th Cir. 1996) (implementing another antique antitrust opinion that is unlikely to be reaffirmed if the Supreme Court revisits the subject). It held that *Motion Picture Advertising Service* is not controlling even if it remains authoritative.

First, *Motion Picture Advertising Service* was decided under §5 of the FTC Act. The Commission has the authority under that provision to forbid practices that pose risks to effective competition, even when they do not violate the Sherman Act. The Court remarked on this in

Motion Picture Advertising Service: "The 'unfair methods of competition,' which are condemned by §5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act." 344 U.S. at 394. A district court lacks the FTC's power to go beyond the limits of the Sherman Act. Similarly, *Standard Stations* was decided under §3 of the Clayton Act, 15 U.S.C. §14, and does not assist the plaintiff in a Sherman Act case that cannot be characterized as involving tie-in sales. Granted, the Court remarked in *Motion Picture Advertising Service* that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act", 344 U.S. at 395, but this bald and unreasoned assertion is not conclusive. Poorly reasoned holdings bind the inferior courts; unreasoned dictum does not—and this statement was obiter dictum, for the Court had emphasized only a paragraph before that it was deferring to the FTC's findings as §5 of the FTC Act requires. No subsequent case has read *Motion Picture Advertising Service* to abolish the requirement of concerted action under §1 of the Sherman Act.

Second, *Motion Picture Advertising Service* involved exclusive *dealing*, while this case involves exclusive *distributorships*. Despite the similarity in nomenclature, there is a difference—one vital to the theory of *Motion Picture Advertising Service* itself. See generally Hovenkamp, *Federal Antitrust Policy* §10.8. An exclusive dealing contract obliges a firm to obtain its inputs from a single source. Each of the theaters was committed to one distributor for all of its ads. This was the genesis of the concern about foreclosure. A new advertising distributor could not find outlets. An exclusive distributorship, by

contrast, does not restrict entry at either level. None of the newspapers in Chicago (or anywhere else) has promised by contract to obtain all of its news from a single source—and the sources have not locked all of their output together (unlike the "block booking" involved in *Loew's*). A new entrant to the supplemental news service business could sell to every newspaper in the United States, if it chose to do so. Existing features syndicates sell to multiple firms in the same market (although most features go to one paper per city; this is the exclusive distribution aspect of the contracts). So vendors can and do sell news and features to multiple customers, and customers can and do buy news and features from multiple vendors. "Foreclosure" of the kind about which *Motion Picture Advertising Service* was concerned does not occur under exclusive distribution contracts.

Third, the FTC and the Supreme Court concluded that even exclusive dealing contracts are lawful if limited to a year's duration. 344 U.S. at 395-96. The Commission saw that exclusivity can promote competition by making it feasible for firms to invest in promoting their products—for these costs would not be recoverable if the contracts were of very short terms, or if rivals could exhibit the same films and obtain the benefit of this promotional activity. Moreover, with year-long contracts, the entire market is up for grabs. A new entrant can sell to a twelfth of the theaters in the first month, a sixth of all theaters by the end of the second month, and so on; competition for the contract makes it possible to have the benefits of exclusivity and rivalry simultaneously. Things work similarly in the newspaper business. Contract terms are short, so competition for the contract can flourish. Meanwhile, exclusive distribution of news or fea-

tures through a single paper in a city helps the paper distinguish itself from, and compete with, its rivals. The *Sun-Times* will not promote a readership for a particular columnist if the *Tribune* and the *Herald* carry the same column; free-riding would spoil the investment and thwart this aspect of competition.

Contracts in the news business, unlike those in the motion picture advertising business, are of indefinite duration, and either side may terminate after giving the required advance notice. According to the *Herald*, this makes all the difference, but we don't see why. A termination clause works just like a stated time limit in facilitating competition for the contract. The FTC did not insist that dealings between a distributor and a theater *cease* after a year; the parties were free to renew their arrangement for successive years; it was enough that there be an option to change distributors or renegotiate once a year. That option exists in the newspaper business. Both sides to these contracts enjoy an annual (or more frequent) right to negotiate new terms or change partners. To this the *Herald* responds, in essence: The contracts aren't terminated in fact, so the legal terms do not matter; the contracts should be treated as perpetual. Yet for all we can tell renewal was (and remains) the norm in the motion picture business. As long as arrangements serve the interests of both parties, they will continue, whether that means signing another in a series of one-year contracts or declining to exercise an annual option to cancel a contract. Enduring exclusive distribution contracts characterize markets that are recognized as competitive: for example, *Babylon 5* appears exclusively on WPWR-TV (Channel 50) in Chicago, and almost all other shows are exhibited exclusively on one channel per

locale, sticking with that station for their entire original production run, even though no one thinks that individual stations or producers have market power. Cf. *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992); *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994). The FTC and the Supreme Court in *Motion Picture Advertising Service* wanted to ensure that dealings continued only while they remained in the interests of both distributors and theaters—which meant that someone else could come along with a better deal and get the business. Likewise someone with a better offer can get or sell news on short notice. The *Herald* has never tried to make a better offer, and we conclude that it has come to the wrong forum. It should try to outbid the *Tribune* and *Sun-Times* in the marketplace, rather than to outmaneuver them in court.

AFFIRMED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 21, 1997.

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

PADDOCK PUBLICATIONS, INC., doing business as The Daily Herald,

Plaintiff-Appellant,

No. 96-2058 v.

CHICAGO TRIBUNE COMPANY, *et al.,*

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 7493—David H. Coar, Judge.

ORDER

Plaintiff-appellant filed a petition for rehearing and suggestion of rehearing en banc on January 9, 1997. No judge* in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Cummings took no part in consideration of the suggestion for rehearing en banc.

App. 14

[Dated September 26, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	
Plaintiff,	)	No. 93 C 7493
v.	)	
CHICAGO TRIBUNE COMPANY, *et al.*,	)	
Defendants.	)	

TO: HONORABLE JOHN A. NORDBERG, JUDGE
UNITED STATES DISTRICT COURT

Magistrate Judge Ronald A. Guzman's
Report and Recommendation on Defendants'
Joint Motion to Dismiss Complaint Or
in the Alternative for Summary Judgment

This case presents an unusual question of antitrust law. Plaintiff Paddock Publications publishes the Daily Herald, a general-interest newspaper sold principally in the suburbs of Chicago. The Daily Herald competes with the much larger established Chicago newspapers, the Chicago Tribune and the Chicago Sun-Times, published by defendants Chicago Tribune Company and Chicago Sun-Times, Inc., respectively. Paddock claims the Daily Herald is unable to compete effectively because it cannot subscribe to one of the leading supplemental news services because both of them have exclusive licensing

agreements with either the Tribune or the Sun-Times. Likewise, Paddock is unable to publish many popular syndicated features and cartoons because they are exclusively licensed to one major newspaper or the other.

Attacking the exclusive licenses as unreasonable restraints of trade, Paddock brought this suit under the Sherman and Clayton Acts seeking a declaratory judgment that the exclusive licenses are unlawful and enjoining their enforcement. The defendants, the Chicago Tribune Company and Chicago Sun-Times, Inc., together with the supplemental news services and feature syndicates involved, have moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(c). The motion has been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

A motion to dismiss, like a motion for summary judgment, may be granted only if the movant is entitled to judgment as a matter of law. In deciding a motion to dismiss, we assume that all factual allegations of the complaint are true and draw every reasonable inference in the plaintiff's favor. *Bowman v. City of Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992). If, despite these presumptions, "no relief could be granted under any set of facts that could be proved consistent with the allegations," the complaint must be dismissed. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

If the allegations of the complaint, taken as true, would permit the court to grant relief, the court must nevertheless grant summary judgment for the defendant if, after the plaintiff has responded to the defendant's motion, "the pleadings, depositions, answers to interroga-

tories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the defendant is entitled to a judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. The court is to draw all reasonable inferences in favor of the non-movant, but the non-moving party is required to go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991).

BACKGROUND FACTS

The following account of the relevant facts is taken from Paddock's complaint and defendants' Statement Of Material Facts As To Which There Is No Genuine Dispute (Def. SOF); these facts are undisputed except as noted.[1] The Chicago Tribune and the Chicago Sun-Times dominate the market for general-interest newspapers in the Chicago metropolitan area; their respective approximate market shares are 42% and 30%. Complaint ¶ 21. Paddock's Daily Herald is distributed in the northern and western suburbs of Chicago where it competes with the Tribune and Sun-Times. Its market share in the Chicago metropolitan market is approximately 7%.[2] *Id.* Paddock wants to extend its circulation into the entire suburban area, but alleges its ability to compete with the

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[1] For the purposes of this motion the defendants accept as true the allegations of the complaint.

[2] In its response to Def. SOF ¶ 8, Paddock states that its expert believes that only the Tribune, Sun-Times and Daily Herald are attempting to compete in the entire metropolitan area. Limiting the market to these three newspapers yields figures of 53%, 38% and 9% respectively.

two dominant papers is substantially impaired by the Tribune's and Sun-Times's licensing arrangements.

Only a portion of the material appearing in a general-interest newspaper is produced by the newspaper's own staff. The news services to which newspapers subscribe provide a constant stream of news material. Newspapers also subscribe to features syndicates that provide feature stories, opinion and editorial columns, comic strips, advice columns, television listings and the like. All materials distributed by the news services or syndication services are copyrighted, and may not be reprinted without appropriate licenses.

Virtually all newspapers, including the Daily Herald, subscribe to the Associated Press (AP) news service on a non-exclusive basis. Def. SOF ¶¶ 11, 12. To supplement AP's material, newspapers serious about news coverage also subscribe to one or more supplementary news services. The two leading supplementary news services are the combination of the New York Times News Service and New York Times Graphics Service (collectively, NYTNS), distributed by defendant New York Times Syndication Sales Corporation, and the Los Angeles Times/Washington Post News Service (LAT/WPNS), distributed by defendant Los Angeles Times/Washington Post News Service, Inc. Several formerly independent news services, such as Hearst Newspapers News Service, Newhouse News Service, and Gannett News Service, have become affiliated with either the NYTNS or the LAT/WPNS and so are no longer separately available. Complaint ¶24.

Access to either the NYTNS or the LAT/WPNS is essential in order for a newspaper to provide the authoritative news coverage necessary to be competitive in the

Chicago market. The Chicago Tribune has an exclusive license to publish material from the New York Times News Service in the Chicago market and the Chicago Sun-Times has an exclusive license to publish material from the Los Angeles Times/Washington Post News Service. Because of these exclusive licenses, Paddock has been denied access to them. Complaint ¶24. Only a small portion of the material available from either service is published by the Tribune or the Sun-Times, so most of it is never made available to Chicago-area newspaper readers. *Id.* ¶¶ 24, 25.

Paddock similarly finds itself cut out of the most desirable newspaper features, columns and comics because the defendant syndicators license them under exclusive contracts with either the Tribune or the Sun-Times. Paddock alleges it is necessary for a general-interest newspaper to have access to them in order to compete effectively. *Id.* ¶¶ 26-28. As a consequence of the practice of exclusive licensing, Paddock can only buy those features the larger papers don't want. If Paddock chooses to publish a feature, it cannot obtain exclusive rights; if the feature proves popular, one of the major papers can also license and publish it. *Id.* ¶29.

The Tribune and Sun-Times can waive their rights under their exclusive licenses and permit others to publish materials from the news services and feature syndicates. But although the Sun-Times has waived its rights with respect to some local papers that publish in the far suburbs (and compete with the Daily Herald), it has refused to do so for the Daily Herald. *Id.* ¶31.

Paddock alleges that these exclusive dealing contracts unreasonably restrain competition and that it cannot

compete effectively unless the court enjoins their enforcement. Count I alleges that the exclusive licenses are "assets" of the defendant news services and syndication services which have been "acquired" by the Tribune and Sun-Times, and their acquisition has substantially lessened competition in violation of § 7 of the Clayton Act, 15 U.S.C. § 18. Count II alleges that the exclusive contracts are unreasonable restraints of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

THE EXCLUSIVE CONTRACTS

The Chicago Tribune's contract with New York Times Syndication Sales Corporation for the NYTNS is a three-year contract commencing January 1, 1992 and expiring December 31, 1994 giving the Tribune a one-time right of publication. Pl. App. Exh. 76. Although by its terms the contract is non-exclusive, the defendants have stated for the purpose of this motion that it is exclusive. Def. SOF ¶4. After the expiration of its three year term, the contract is automatically renewed from year to year thereafter unless either party gives ninety days' notice of termination. The price may be adjusted by mutual consent. The Tribune has a similar contract with the New York Times Picture Service. Pl. App. Exh. 77.

The Chicago Tribune's contract with The Universal Press Syndicate, Pl. App. Exh. 25, also has a three-year term commencing January 1, 1992. The Universal Press Syndicate has agreed not to license the features licensed to the Tribune to any newspaper published within a 50-mile radius of State and Madison Streets in Chicago.

The Chicago Tribune's contract with United Feature Syndicate for the "Peanuts" comic strip, Pl. App. Exh. 26,

has a term of five years commencing March 28, 1988, automatically renewed for one-month terms thereafter. It is terminable by either party by written notice "at least one month before the end of the then current term." Since this is logically impossible, either one year renewal terms were intended (the printed word "month" was changed to "year" in describing the term but not in describing the renewal term), or the parties intended that at least a month's notice be given to break the cycle of automatic renewal.

The Chicago Tribune's contracts with United Feature Syndicate for the comic strips "Outside," "Big Nate," and "Queen of the Universe," Pl. App. Exhs. 27-29, have terms of thirty days, automatically renewed for thirty-day terms thereafter, and similarly terminable on 30 days' notice. The Chicago Tribune's contract with United Feature Syndicate for various other comic strips is a modification of an original agreement dated April 1, 1969. It has a three-year term commencing March 1, 1992 and continuing thereafter unless terminated upon six months' written notice. Pl. App. Exh. 34.

The Chicago Sun-Times's agreement with Los Angeles Times Syndicate, Pl. App. Exh. 32, has a term of one year commencing August 3, 1992 and is automatically renewed for one-year terms thereafter. It is exclusive "as to other local newspapers in your market."

The Chicago Sun-Times's license from United Feature Syndicate for the comic strip "Garfield," Pl. App. Exh. 30, commencing January 4, 1993, does not state that it is exclusive. It is terminable by either party on thirty days' written notice. An earlier contract commencing January 4, 1980, Pl. App. Exh. 31, licensing "Garfield" as well as

other comic strips, grants exclusive rights within a 50-mile radius of State and Madison Streets in Chicago. It is also terminable on 30 days' written notice.

The Chicago Sun-Times's contract with the New York Times Syndication Sales Service for the "Medical Tribune News Service," Pl. App. Exh. 78, is expressly exclusive. It commenced on September 15, 1991 and is automatically renewed for 90 day terms. Either party may terminate by giving notice "at least ninety days prior to the then-current term." Since again this is logically impossible, we assume ninety days' notice is meant.

ANTICOMPETITIVE IMPACT

An element of Paddock's case under both § 7 of the Clayton Act and § 1 of the Sherman Act is a showing of anticompetitive impact—that the exclusive contracts have substantially lessened competition (Clayton Act) or restrained trade (Sherman Act) in a relevant market. The defendants agree that the relevant market is general-interest newspapers in the metropolitan Chicago area. Def. Br. at 4. Defendants dispute that Paddock has shown any injury to competition, or even to itself. They do not, however, meet the standard for summary judgment by demonstrating that there is no genuine issue of material fact.

According to Paddock's president, Daniel E. Baumann, and its editor, Douglas K. Ray, the Daily Herald has been published as a daily newspaper in suburban Arlington Heights since 1969. A Saturday edition was added in 1975 and a Sunday edition in 1978. In 1987 Paddock decided to expand its circulation in an effort to become the leading daily newspaper in the Chicago suburbs, directly

competing with the Tribune and Sun-Times. It substantially expanded its staff in order to cover suburban news, and its news staff is nearly double the usual size for a paper of its size. It improved its delivery services and invested in high quality printing presses and four-color technology. Baumann Aff. ¶¶2, 3.

In order to compete with the two major Chicago papers, however, the Daily Herald would have to offer comparable national and international coverage. A Washington, D.C. news bureau and remote correspondents such as the Sun-Times and Tribune have was beyond Paddock's resources. A paper such as the Daily Herald must have access to one of the leading supplemental news services. The NYTNS and LAT/WPNS are by far superior to others, and they have recently absorbed other formerly independent news services. Exclusive licensing to the Sun-Times and Tribune has made them unavailable to the Daily Herald. (A third possibility, Knight-Ridder/Tribune Information Services, is co-owned by the Tribune.) Although Paddock subscribes to news services offered by the Christian Science Monitor and Reuters, these are inadequate to enable the Daily Herald to compete effectively. *Id.* ¶4; Ray Aff. ¶ 2-4.

Baumann also states that effective competition would be very difficult without access to popular syndicated features that are licensed exclusively to either the Tribune or Sun-Times, since fewer and fewer people are willing to purchase more than one newspaper. Baumann Aff. ¶5. While Ray acknowledges that the defendants are correct that a wealth of other material is available, most of it is material that readers do not want to read. Ray Aff. ¶9. And if Paddock has the good fortune or good judgment to license a feature that the major papers have not taken

that readers *do* want to read, it becomes popular and of the major papers can then obtain a non-exclusive license for itself. *Id.* ¶¶5, 10.

Thomas E. Jackson, publisher of the Daily Southtown, another small competitor of the Chicago Tribune and Chicago Sun-Times circulating in the southern part of the Chicago metropolitan area, agrees that a newspaper that lacks access to the highest quality news services and most popular features is at a great competitive disadvantage. Jackson Aff. ¶ 3.

William J. Woestendiek, a professor of journalism at the University of Southern California, has worked both for large newspapers having the benefit of exclusive licenses and small papers excluded by them. He agrees that exclusive licenses hurt competition. Because other news services are not comparable in quality to NYTNS and LAT/WPNS, any would-be competitor unable to obtain access to one of them is at a distinct disadvantage. The system of exclusive licenses means that the leading papers are able to publish whatever is desirable, with potential competitors getting the leftovers. Woestendiek Aff. ¶¶ 3-6.

Because of package licensing of features, the Tribune and Sun-Times have exclusive licenses to some features they do not even use. Baumann Aff. ¶2. Ray notes that the Tribune often uses its own staff to cover national and international stories rather than rely on the NYTNS, so that much of its exclusively licensed material is not published in the Chicago market. Ray Aff. ¶6.

Paddock's inability to license the leading supplementary news services and features has meant that the Daily Herald has been unable to attract a significant

number of readers in its expansion into DuPage County, and has postponed its expansion. If it could license this material, the Daily Herald would be able to win a large number of readers from the Tribune and Sun-Times because of its superior coverage of suburban news. Baumann Aff. ¶¶ 7, 8.

The defendants have several responses. First, they repeat the familiar saying that the antitrust laws protect competition, not competitors, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); it is not enough for Paddock to show that it has difficulty competing. Def. Br. 10-11. Nevertheless, Paddock has alleged an impediment to competition; any smaller third paper attempting to compete in the Chicago metropolitan market with the Chicago Tribune and Chicago Sun-Times will come up against the same obstacle of exclusive licenses. According to Paddock's expert, Dr. William G. Shepard, chairman of the economics department of the University of Massachusetts, two competitors are not enough to insure a competitive market. Shepard Aff. ¶¶ 24, 35, 36, 38. A practice that permanently limits to two the number of general-interest Chicago newspapers (unless a third high-quality news service is organized) has the potential of raising the price (or lowering the quality, which amounts to the same thing), and reducing the total output of newspapers in the Chicago market.

It is true that if a would-be competitor can afford it, it can purchase exclusive licenses for itself. The license terms are short, and Paddock has not offered evidence showing that the news services or syndicators would not accept a higher bid from a competitor. The successful bidder could, perhaps, negotiate for the right to sublicense and resell non-exclusive licenses to help defray the

cost. Nevertheless, drawing reasonable inferences in Paddock's favor, it appears that exclusive licenses are a significant barrier to entry and may serve no useful purpose other than maintaining the duopoly in the Chicago market.

Defendants' next objection is that competition in the Chicago newspaper market is "flourishing." Both the Tribune and the Sun-Times have sizable shares of the market and the Daily Herald's share is growing. Def. Br. 12-13. "The Daily Herald's ability to increase its market share without access to the materials under exclusive contract belies any credible claim of injury." *Id.* at 14 n.21. While it is undisputed that the Daily Herald's share is growing, there is no rule that a growing competitor cannot complain of a violation of the antitrust laws. The antitrust laws forbid unreasonable restraints on competition, not just ruinous ones. Perhaps the defendants can convince the court at trial that Paddock has suffered no injury, but they have not shown the absence of a factual dispute on this issue.

CLAYTON ACT § 7

A. Introduction

Section 7 of the Clayton Act, 15 U.S.C. § 18, reads in pertinent part as follows:

> No person engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce, where in any line of commerce in any section of the country,

> the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

Equitable remedies available under 15 U.S.C. § 25 in a private action to restrain a violation of § 7 may include the forced divestiture of the offending acquisition. *California v. American Stores Co.*, 495 U.S. 271 (1990).[3]

The relationships addressed by antitrust law are divided into "horizontal" and "vertical." "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988). Section 7 is typically applied to "horizontal" combinations—the merger with, or acquisition of, a competitor or potential competitor at the same level of distribution. Such an acquisition or merger threatens competition by reducing the number of sellers in a market, making collusion easier, and by concentrating much of the supply capacity in one or a few firms. This permits them to restrict output and increase price because the remaining firms are too small to be able to satisfy the excess demand, at least in the short run. See

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[3] The defendants contend that Count I should be dismissed as to the syndicates and news services because § 7 applies only to acquiring persons. However, Paddock points out that sellers can be joined as defendants in a § 7 action when the plaintiff seeks rescission or divestiture and the court needs jurisdiction over both the buying and selling company in order to fashion appropriate equitable relief. *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227-28 (9th Cir. 1978). Accordingly we do not recommend dismissal of Count I against the licensors on this ground.

FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989).

However, Section 7 also reaches "vertical" acquisitions and mergers between firms and their suppliers. The anticompetitive effects of a vertical combination are less obvious. They may include (1) cutting off the supplied firm's competitors from the acquired supplier, (2) foreclosing competitors of the supplier firm from a substantial portion of a market (the formerly separate purchaser), or (3) requiring actual or potential competitors to enter or continue in the market only on a vertically integrated basis because of advantages unrelated to economies attributable solely to integration. *Brown Shoe*, 370 U.S. at 294, 323-24, 328-33; *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 352 (2d Cir. 1979). These supposed anticompetitive effects have been criticized as a matter of economic theory. See, e.g., 4 P. Areeda & D. Turner, Antitrust Law 221-25, 314 (1980); R. Bork, The Antitrust Paradox 210-16, 225-38 (1978). Nevertheless, *Brown Shoe* and its progeny have not been overruled, and there can be no question that § 7 reaches vertical acquisitions.

The relationship between syndicators and newspaper publishers challenged in this suit is a vertical one. At first glance, the facts appear to come within § 7. The syndicates' exclusive rights to copy and publish their copyrighted material in the Chicago geographic market can be considered "assets." These assets have been acquired by the Tribune and Sun-Times. Paddock has a plausible argument that these exclusive licenses have impeded competition in the newspaper market in the Chicago area; but for the exclusive licenses, Paddock and others would be capable of producing newspapers competitive with the Tribune and Sun-Times. The defen-

dants do not dispute that they are "persons" subject to the jurisdiction of the FTC.

B. Are Short-Term Exclusive Licenses "Acquisitions"?

Nevertheless, we believe that § 7 is not applicable. We agree with Paddock that exclusive licenses may qualify as "assets" for purposes of § 7. See *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981) (exclusive patent license); *U.S. v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400 (D.Ia. 1991) (long-term lease with option to purchase); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960) (14-year exclusive license to distribute films for television exhibition); see generally, 3 Von Kalinowski, Sullivan and McGuirl, Antitrust Laws and Trade Regulation §§ 24.05, 24.07 (1993). But we question whether the acquisition of exclusive rights for a short term amounts to an acquisition of assets under § 7.

Because of their breadth, the antitrust statutes are interpreted in accordance with their legislative history and intention and do not necessarily apply to all conduct that falls within their literal proscriptions. See *National Organization for Women v. Scheidler*, 968 F.2d 612, 617 (7th Cir. 1992), rev'd on other grounds, 114 S. Ct. 798, 127 L. Ed. 2d 99 (Jan. 24, 1994).[4] The history of § 7

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[4] In *Scheidler*, providers and potential consumers of abortion services sued individuals and organizations who had allegedly conspired to put abortion clinics out of business through intimidation and harassment. Plaintiffs claimed defendants' conduct violated RICO and the Sherman Act. The Seventh Circuit held that neither statute applied. The Supreme Court granted

(continued...)

convincingly establishes that it was intended to address acquisitions of assets that are functionally equivalent to mergers or stock acquisitions. As recounted by the Seventh Circuit,

> The Clayton Act was passed in 1914 against a background of disappointment with the Supreme Court's interpretation of the Sherman Act. . . . [L]anguage in the Court's opinions . . . aroused anxiety that it was too difficult to prove a violation. The response of the draftsmen of the Clayton Act was to identify particular anticompetitive practices and forbid them upon a showing not that they would, but merely that they might, lessen competition substantially. Among these practices was the acquisition of the stock of a competitor; such acquisitions, particularly when secret, were thought to be among the methods that trusts used to acquire market dominance and intimidate rivals.
>
> Although the Clayton Act gave the Department of Justice jurisdiction concurrent with the Federal Trade Commission to enforce its provisions, 15 U.S.C. §§ 21, 25, only the FTC seemed interested in enforcing Section 7 and its ability to do so against mergers as distinct from pure stock acquisitions was crippled by a series of decisions narrowly interpreting the Commission's powers under section 11. . . . In addition, when the Department of Justice brought suit under section 1 of the Sherman Act against a substantial asset acquisition . . . it was rebuffed in an opinion widely regarded as imposing—once again—an undue burden on the antitrust plaintiff.

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[4] (...continued)
certiorari as to the RICO claim and reversed the Seventh Circuit without addressing the dismissal of the Sherman Act claim.

> It was against this background that Congress in 1950 amended section 7 to plug the asset-acquisition loophole and by doing so to bring mergers and other asset acquisitions under the less demanding standard of the Clayton Act.

United States v. Rockford Memorial Corp., 898 F.2d 1278, 1282 (7th Cir. 1990) (citations omitted); see also *Brown Shoe*, 370 U.S. at 311-323 (1962).

What makes the acquisition of assets functionally equivalent to a merger or a stock acquisition is that it places the productive capacity represented by those assets—or dependent upon them, if they are an input for other economic activity—at the disposal and control of the acquiring firm. By removing the productive capacity of the acquired firm from autonomous control, the acquiring firm no longer must compete with the acquired firm's output in the case of a horizontal acquisition. In the case of a vertical acquisition, the acquiring firm need not compete for the output of the acquired firm, and it also has the ability to deny that output to competitors. In either case it is the acquisition of control over the productive capacity represented by the acquired assets that poses the threat to competition. See Hospital Corp. of America v. FTC, 807 F.2d 1381 (7th Cir. 1986) (acquisition of management contracts treated as acquisition under § 7).

From this perspective, we do not believe that the short-term contracts involved here qualify as "acquisitions of assets" for the purposes of § 7, any more than we would consider an "acquisition" a farmer's advance sale of his crop for the coming year. A short-term exclusive contract is not a "permanent restructuring of the supplier-customer relationship." See *United States Steel Corp. v.*

F. T. C., 426 F.2d 592, 601 (6th Cir. 1970). Although the relationships between the Tribune and Sun-Times and the syndicates and news services have tended to be long-term, the contracts themselves are for terms of five years or less, and many can be terminated on thirty days' notice.[5]

Although on a motion for summary judgment we might be reluctant to hold as a matter of law that exclusive contracts extending for more than a year are not acquisitions addressed by § 7, we need not decide where the dividing line might be. The contracts in issue having terms of more than one year[6] can all be terminated less than a year from now. There is therefore no substantial limitation on competition at this time. Since Paddock seeks a declaratory judgment and not damages, the court must look to the present and future, not the past. Without any allegation that the Tribune intends to enter such contracts again, Paddock does not have standing to seek a declaratory judgment that exclusive contracts having a term greater than one year are impermissible acquisitions.

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[5] Paddock contends that there is a dispute of fact concerning the duration of these contracts, Pl. Br. at 43, but offers no evidence indicating that they are not terminable in accordance with their provisions. Nor has Paddock offered any evidence that would tend to show that a competitor could not bid against the Tribune or Sun-Times and induce a syndicate or news service to exercise its termination rights in order to grant the competitor a more remunerative contract.

[6] The Chicago Tribune's three-year contracts with the NYTNS, New York Times Picture Service and the Universal Press Syndicate, and its five-year contract with United Features Syndicate for the "Peanuts" comic strip.

C. Section 7 does not address Paddock's complaint

There is a second reason to find that § 7 does not apply to this situation. Paddock does not propose to compete for exclusive licenses for the news services and features it wants. Paddock's real problem is that, as a small paper, it cannot offer what the Chicago Tribune and Chicago Sun-Times can for an exclusive license, and its only hope is to compel the syndicates and news services to license it on a non-exclusive basis. This is not the problem § 7 was intended to address. Section 7 addresses acquisitions resulting in lessened competition, but it is not the Tribune's and Sun-Times's acquisition of exclusive licenses to which Paddock objects, but the practice of exclusive licensing as such. While it is accepted that one of the anticompetitive effects of a vertical acquisition can be the exclusion of a downstream competitor of the acquiring firm from the acquired supplier, see *Fruehauf, supra*, that presupposes that the competitor was able to compete for the supplier's output before the acquisition.

Section 7 is a vehicle for preventing or rescinding the acquisition of control of a unit of economic activity, not for altering the way players in a market have chosen to structure their transactions. Unlike the Sherman Act, Section 7 addresses conduct by a single actor: "no person . . . shall acquire, directly or indirectly . . . ." Here the alleged impediment to competition does not arise from a single acquisition, but from the independent conduct of both the Tribune and Sun-Times. According to the complaint, Paddock can compete if it can obtain material from either the NYTNS or the LAT/WPNS. Only if both news services sell exclusive rights in the Chicago market is competition substantially lessened and § 7 violated. Although the violation occurs only when the second news

service sells an exclusive license, the only plausible remedy would be to require both news services to take non-exclusive licenses, and this is the remedy Paddock seeks.

This contrasts with the usual functioning of § 7. While § 7 is used to forestall acquisitions that would result in oligopoly, it is applied to single acquisitions that increase market concentration above some threshold and the remedy addresses that acquisition alone. A violation of § 7 is not the common responsibility of all players in the market; other players are not required to divest earlier acquisitions made when the market was less concentrated.

We therefore conclude that insofar as Paddock complains of the newspaper defendants' acquisition of exclusive licenses, their short terms prevent them from being treated as asset acquisitions for purposes of § 7, and insofar as Paddock complains of the exclusivity of the licenses and is only willing to bid on non-exclusive licenses, that concern is beyond the reach of § 7. We accordingly recommend that summary judgment be granted for all defendants on Count I.[7]

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[7] Should the court disagree with our conclusion that the Clayton Act is inapplicable, the Seventh Circuit has indicated that the Rule of Reason analysis under § 7 of the Clayton Act follows the same standard as under § 1 of the Sherman Act—whether the merger or acquisition is likely to reduce competition substantially. *Rockford Memorial*, 898 F.2d at 1282-83. The following attempt to apply the Rule of Reason under the Sherman Act may then be helpful.

SHERMAN ACT § 1

A. Introduction

Just as this is not a typical Clayton Act § 7 case, it is not a typical Sherman Act § 1 case, either. The parties and the court have only been able to find one published opinion addressing the kind of claim Paddock raises, *Woodbury Daily Times v. Los Angeles Times-Washington Post News Service*, 616 F. Supp. 502 (D.N.J. 1985), aff'd mem. 791 F.2d 924 (3d Cir. 1986).[8] As discussed below, we find it unpersuasive. We also find unpersuasive defendants' argument that the exclusive licenses should be treated as distribution agreements, which have virtually always been found acceptable under § 1.

Nevertheless, although we believe defendants are mistaken as to why Paddock's claim fails, we conclude for other reasons that Paddock fails to state a claim under § 1. Because the district court may disagree with our analysis, however, we will explain why we believe the defendants' approach is not persuasive, even though this reasoning is not the basis for our conclusion.

To recapitulate the basic law, § 1 of the Sherman Act, 15 U.S.C. § 1, states that

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[8] In addition to *Woodbury*, we have found two cases challenging newspapers' exclusive licensing of news or features under the Sherman Act. *United States v. Chicago Tribune-New York News Syndicate and Globe Newspaper Co.* (S.D.N.Y. 1975), resulted in a consent decree, 1975 Trade Cases (CCH) ¶60,185 (March 5, 1975), but no published discussion of antitrust issues. *Oakland Tribune, Inc. v. The Chronicle Publishing Co., Inc.*, 762 F.2d 1374 (9th Cir. 1985), affirmed the denial of a preliminary injunction in a suit under § 2 of the Sherman Act but did not discuss the merits.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

Although all-encompassing on its face, the Supreme Court has long held that § 1 prohibits only unreasonable restraints of trade. *Business Electronics*, 485 U.S. at 723. A restraint may be found unreasonable either because it fits within a class of restraints held to be unreasonable *per se*, that is, conduct that would always or almost always tend to restrict competition and decrease output, *id.*, or because it violates what has come to be known as the "Rule of Reason." Under the Rule of Reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977)).

The claimed restraints, the exclusive contracts between the syndicators and news services and the Tribune and Sun-Times, are purely vertical. There is no claim that the Tribune and Sun-Times have conspired or colluded with each other. Because only vertical restraints that incorporate an agreement setting resale prices are unlawful per se, *Business Electronics*, 485 U.S. at 736, the Rule of Reason is appropriate here.

B. The distribution agreement model

The law of vertical restraints has evolved addressing the relationship between a manufacturer or wholesaler

on one hand and a distributor or dealer on the other, what we will call the "dealer relationship," rather than the relationship between a manufacturer and a supplier of an input. Courts have recognized that while vertical restraints can limit competition among dealers, they can also help the manufacturer compete with other manufacturers. A dealer required to provide minimum levels of pre-sale or post-sale services may be given an exclusive territory so that it does not face price competition from another dealer that might tempt both dealers to skimp on services to minimize prices. Although exclusive territories reduce competition between dealers in the same brand—intrabrand competition—the manufacturer reasonably hopes that by insuring the provision of services to consumers the total mix of product and services will better compete with its rivals—that is, the restraint will facilitate interbrand competition. See *Continental T.V.*, 433 U.S. at 54-55.

Defendants attempt to compare this case to a market in which there are two leading brands, each with exclusive regional distributors. Each manufacturer has the right to determine to whom it will sell, and a would-be distributor cannot use the Sherman Act to coerce a manufacturer to appoint it a distributor of Brand X or Brand Y. Courts have held that, since the manufacturer could integrate vertically and own the distributor directly, there can be no unreasonable restraint of trade in choosing an exclusive distributor. Further, since it is in the manufacturer's interest to compete with other manufacturer's products, the way in which it chooses to sell its products will tend to be competitive and in the interest of consumers. As long as there is effective interbrand competition, how a manufacturer chooses to organize its

distribution is not a concern of the Sherman Act. If the manufacturer is the sole source for such goods, consumers are indifferent to how it chooses to allocate the monopoly profit it can earn, while if the market is competitive, the goods cannot be sold for more than the competitive price no matter how they are sold. See, e.g. *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805-810 (6th Cir. 1988); *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216, 1225-26 (10th Cir. 1986).[9]

But it is a distortion to speak of newspapers as "distributors" of news and features "manufactured" by the syndicators and news services. It is very doubtful that consumers view the Tribune as a NYTNS outlet and the Sun-Times as a LAT/WPNS outlet; certainly there is no evidence in the record that they do. It is not likely that one reader in a hundred buys the Tribune rather than the Sun-Times because he or she prefers NYTNS stories rather than LAT/WPNS stories. Newspaper publishers are not simply resellers, but creators of products in their own right. While news services and syndicates provide important, perhaps necessary ingredients, each newspaper is the sum of its news services, its features, and its own reporting and commentary. Because a general-

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[9] Respected commentators have taken the position that antitrust law should not be concerned with manufacturers' restrictions on dealers at all. See F. Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135 (1984). Courts cannot go that far until the Supreme Court overrules precedents declaring vertical price restraints unlawful *per se*. See *Business Electronics*, 485 U.S. at 733-36; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). Nevertheless courts today regard complaints of vertical restraints in the dealer relationship with great skepticism.

interest newspaper includes original material, a new competitor in the Chicago market that subscribed to NYTNS would compete with the Tribune on many other fronts besides being a competing "dealer" in NYTNS stories; it would compete as a package of materials selected and edited from both common sources and original materials.

The fact that newspapers are a separate product serves to distinguish the non-newspaper cases cited by defendants, since they involve distribution of a product, not the creation of a new product using the supplier's product as an input.[10] Defendants cite several cases involving exclusive contracts between television networks or program suppliers and television stations or cable companies.[11] These are not comparable, even though the prod-

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[10] It could be argued that any "product" sold at retail is actually the sum of the product the dealer receives from the manufacturer and the incidental products and services the dealer provides. A car dealer's showroom, salesperson's time, warranty service and dealer-added accessories, for example, are all added into the package a customer buys when he or she buys a car. Nevertheless, at some point the value added by the second party is determinative. A newspaper is no more incidental "packaging" for the syndicated stories it buys than a bus is "packaging" for the truck chassis upon which it is built.

[11] *Ralph C. Wilson Industries v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1364 (9th Cir. 1986) is typical. The plaintiff, a television broadcaster, had challenged exclusive licenses granted to nearby stations by programming suppliers. It claimed it was in a different market from these licensees, so that its exclusion was unreasonable under § 1 of the Sherman Act. The parties agreed that the product market was "quality" television programming. After deciding plaintiff was, in fact, in the same geographic market, the court held that the plaintiff could not challenge the exclusive licenses, since it had not

(continued...)

uct is also copyrighted information. From the perspective of a viewer who chooses to watch a syndicated or network program, television stations do not generate a separate product apart from the licensed program itself. Consumers choose which station to watch according to the program they want to see, and the station is, with respect to that program, nothing but a conduit with interruptions for advertising. Consumers are, so far as we know, indifferent to which station carries a program they want to watch. It is therefore appropriate to define the market as television programming, not "television broadcast services."

In contrast, a consumer cannot buy less than an entire newspaper even if he only wants to read a particular story or feature. And while consumer welfare is unlikely to be affected by how many cable companies are licensed to deliver a network's offerings to consumers, cf. *TV Communications Network v. Turner Network*, 964 F.2d 1022 (10th Cir. 1992), newspapers compete in many areas other than syndicated news and features. Reducing the number of newspapers implicates consumer welfare in a way in which reducing the number of distributors of a product would not. And since newspapers are a prime outlet for political opinion and commentary, the public interest favors a plurality of newspapers which may take precedence over concerns of economic efficiency. We note that in the Newspaper Preservation Act Congress provided for the suspension of the antitrust laws to permit

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[11] (...continued)
shown that it was unable to bid for quality programming, that prices were fixed or output restricted; it was simply unwilling to pay the going rate in the existing market.

failing newspapers to share production, distribution and business operations with more successful rivals in order to preserve editorial diversity. See 15 U.S.C. § 1801 *et seq.*; *Committee For An Independent P-I v. Hearst Corp.*, 704 F.2d 467 (9th Cir. 1983).

For these reasons the non-newspaper cases reflecting the indifference of antitrust law to "intrabrand competition" in the context of the dealer relationship do not resolve this case. The facts alleged here must be analyzed in their own right. Accepted antitrust analysis requires that we determine whether the defendant has market power, then weigh the pro- and anticompetitive effects of the challenged restraint.

C. Analysis of exclusive licensing as a vertical restraint

1. Market Power

In this circuit, in order to establish an unreasonable vertical restraint under § 1 in a Rule of Reason case the plaintiff must show that the defendant has market power, the "power to raise prices significantly above the competitive level without losing all of one's business." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987). The defendants do not dispute that the Chicago Tribune and Chicago Sun-Times possess market power. A Sherman Act plaintiff does not have to show that prices have been raised above competitive levels, only that it would be reasonably possible for this to happen. See *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir. 1990).

We initially point out that if the defendants were correct that the relationship between the news services and syndicates and the newspapers should be analyzed as a dealer relationship, we would look at the news services' and syndicates' market power rather than the newspapers'. If a manufacturer has no market power with respect to its products, its arrangements with its dealers cannot injure consumers since prices cannot be raised above competitive levels. See *Valley Liquors, Inc.*, 822 F.2d at 666; *Westman Commission Co.*, 796 F.2d at 1225-26. However, the defendants have been inconsistent. Although treating the newspapers as mere distributors, they have presented no evidence concerning the market power of the syndicates and news services, attempting only to show that the market for newspapers is competitive.

Market power at the "lower" level of the newspapers does not have the same significance that a manufacturer's "upper" level market power has in the usual case of top-down restraints on distribution. When the court looks at the manufacturer-distributor relationship, market power is regarded as a precondition for a vertical restraint to be harmful to consumers. Here, however, market power at the level of the newspapers may be a consequence of the restraint; i.e., the newspapers' market power may be a result of unreasonable exclusive licensing arrangements that have hindered competition. Nevertheless, market power is still relevant, and because the Seventh Circuit has treated market power as an absolute prerequisite for a finding of an unreasonable vertical restraint, we consider evidence of the newspapers' market power.

According to Paddock's economic expert, the Tribune and Sun-Times have a duopoly in the market for general-interest newspapers in Chicago. According to economic theory, a duopoly does not provide effective competition. Shepard Aff. ¶¶ 33-36. Applying the Hirschman-Herfindahl index, an economic measure of market concentration employed by the U.S. Justice Department in its merger guidelines, the Chicago newspaper market is highly concentrated. *Id.* ¶¶ 37-42. Such concentration indicates a very high likelihood that competition will be abridged by cooperation for significant periods of time. *Id.* at ¶ 38. There are substantial barriers to entry. *Id.* ¶¶ 24, 43, 44.[12]

Market concentration may not be dispositive. If there are readily accepted substitutes for a monopolized product, even a monopolist cannot raise its prices much without losing its business (although in such a case the market should be redefined to include those substitutes). Defendants do not contend that such substitutes exist. Paddock has made a showing that the Tribune and Sun-Times control the equivalent of productive assets in the

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[12] The Tribune has been able to maintain its lead over the Sun-Times despite holding its prices 42 percent above the Sun-Times's daily price and 20 percent above its Sunday price. Shepard Aff. ¶24. This indicates that there is price competition between the two newspapers. The Tribune's ability to maintain its market share shows that consumers consider it a superior product. However, accepting Paddock's evidence as true, duopoly makes future price fixing more likely. It should also be pointed out that it is logically possible for two producers of differentiated products in the same market to agree on a price differential, so a persistent price differential between two competing products does not prove that effective competition exists. It only shows that consumers do not regard the two as equivalent.

newspaper business, namely access to desirable news services and features. This makes it plausible that they could restrict output and raise prices to some extent. See *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989). Paddock has also made some showing of barriers to entry, so market concentration and high market share is a reasonable proxy for market power. See *Wilk*, 895 F.2d at 360.

Although both the Chicago Sun-Times and Chicago Tribune have lost circulation while the Daily Herald's circulation has increased, Def. Br. at 6, Declaration of Joseph J. Leonard ¶¶ 16, 18, this does not prove that the Tribune and Sun-Times do not have market power. (It could suggest that they do have it, since reduction of output and loss of market share is a symptom of prices raised above the competitive level.) Paddock points out that the major papers lost circulation in the City of Chicago itself, rather than in the suburbs where Paddock competes with them. See Baumann Aff. ¶ 8 and attached tables. The market for newspapers in the city has shrunk, Leonard Decl. ¶ 16, perhaps as a result of demographic factors, such as an increase in poverty or a decline in literacy. But as long as there are consumers who want newspapers, it is possible for dominant sellers to have market power.

This is an adequate showing of market power to defeat summary judgment. While there is no allegation that the Chicago Tribune and Chicago Sun-Times have conspired to fix prices, there is Shepard's expert opinion that this is likely to occur in the absence of effective competition. Nor should we ignore the possibility that in a highly concentrated market one firm may follow the lead of another in raising prices without an actual agreement or

conspiracy, causing precisely the harm to consumers the antitrust laws were intended to prevent.

2. Possible pro-competitive effects—the Woodbury opinion

Since Paddock has adequately offered evidence of market power and anticompetitive effect, we turn to the heart of the Rule of Reason inquiry: whether the pro-competitive effects of the exclusive licensing arrangements outweigh the competitive hurdle they place in the path of competitors in the Chicago newspaper market.

Defendant relies on *Woodbury Daily Times v. Los Angeles Times-Washington Post News Service*, 616 F. Supp. 502 (D.N.J. 1985), aff'd mem. 791 F.2d 924 (3d Cir. 1986), which granted summary judgment in favor of defendant LAT/WPNS and against the plaintiff, the publisher of a newspaper in the Philadelphia area. LAT/WPNS had granted the Philadelphia Inquirer an exclusive license to publish material from its news service in the Philadelphia metropolitan area, and the Inquirer refused to waive its exclusive right in favor of the plaintiff. The plaintiff challenged the exclusive license as an unreasonable restraint under § 1 of the Sherman Act.

The court applied the rule that in order to prevail under the Rule of Reason the plaintiff had to show either that the challenged restraint applies to businesses not in substantial competition with each other, or that the granted exclusivity is unreasonable under the circumstances. *Id.*, 616 F. Supp. at 506. Finding that the plaintiff was in substantial competition with the Inquirer, *id.* at 509, the court turned to the reasonableness of the exclusive license.

The court noted that limited grants of exclusivity are usual in the industry. Exclusive rights are important to the newspaper licensee, in that the "competitive draw" of the licensed articles would be reduced if the same articles were published elsewhere at the same time. Newspapers therefore request exclusive licenses and are willing to pay for them. *Id.* at 510.

The plaintiff objected that territorial restrictions demanded by the purchaser should be viewed with greater scrutiny than those demanded by the seller. The plaintiff cited cases finding antitrust violations when a horizontal competitor of the plaintiff induced a supplier or lessor to impose or enforce territorial restrictions. Although the horizontal element distinguished these cases from the facts before the court, the court did not distinguish them on this ground, but rather noted that (a) they dealt with the sale of tangibles or property leases rather than copyrights; (b) in the area of copyright licensing, exclusivity was the norm; and (c) the case before the court did not involve the termination of rights the plaintiff had previously enjoyed. *Id.* at 510-11.

The court then found that the LAT/WPNS was not unique, that many other news services (including NYTNS and the Knight-Ridder/Tribune News Service) were available to the plaintiff, and that other comparable suburban newspapers subscribed to them. *Id.* at 511. The court found "interbrand" competition sufficiently outweighed the effects of the exclusive license to the Inquirer:

> The Inquirer's exclusive subscription to [LAT/WPNS] restricts intrabrand competition in the Philadelphia metropolitan area. . . . Yet at the same time, this exclusivity provision encourages interbrand competi-

> tion in that other area newspapers interested in a supplemental news service are obliged to turn to services other than [LAT/WPNS]. In this way, a variety of topics and opinions are made available to residents of the metropolitan area through the newspaper media's use of a number of newswire services. Under the Rule of Reason, pro-competitive effects must be compared and balanced with anti-competitive effects. . . . The court finds that properly limited exclusive subscriptions to news services further competition and consequently the public interest. In the end, such exclusive subscriptions result in each interested area newspaper contracting with a different service, thus guaranteeing that the reading public has access to a wider variety of news reporting and opinions. For these reasons, the Inquirer's exclusive subscription in the eight-county metropolitan Philadelphia area cannot be deemed excessively broad or injurious to competition.

Id. at 511-12.

Woodbury does not decide this case for two reasons. First, Paddock has offered evidence that, unlike the plaintiff in *Woodbury*, it does not have acceptable alternatives to NYTNS or LAT/WPNS and that access to one or both of them is necessary for it to compete effectively. The defendants respond that this is not sufficient to distinguish *Woodbury*, since the court also stated that the plaintiff was free to create its own articles. Def Reply at 6. But Paddock has offered testimony that a subscription to one of the two leading news services is necessary for effective competition, and in deciding this motion for summary judgment we are required to accept this assertion as true. Even though they employ many staff writers and reporters, the Tribune and Sun-Times themselves subscribe to the leading supplemental news ser-

vices and insist on the exclusivity of their licenses. It is reasonable to infer that they consider them necessary.

Second, we are not persuaded by *Woodbury*'s reasoning. We do not understand how the fact that "other area newspapers interested in a supplemental news service are obliged to turn to services other than [LAT/WPNS]" necessarily enhances competition in the market for newspapers, or, for that matter, in the "upstream" market for news services. It may produce diversity in the newspapers offered, but diversity is not necessarily synonymous with competition.

Imagine the market for hamburgers. All hamburgers are made of ground beef, and competitors compete in cooking methods (flame broiled versus grilled), size, weight, and the like, as well as price. If we suppose that one maker of hamburgers has been given the exclusive right to use beef in hamburgers, we would expect to see competitors offering hamburgers made with pork, chicken, turkey and soy protein in an attempt to compete. But all of those ingredients had been available all along; they hadn't been used because consumers prefer beef. Granting exclusive rights in beef hamburgers has resulted in more diversity, but no benefit to customers who want beef hamburgers. Granting one maker the exclusive right to use beef will result in an increase in hamburger prices, which may in turn be an incentive to develop a palatable soy hamburger. But this is a long way from enhancing competition in the hamburger market. There could be no serious argument that granting one producer the exclusive right to use beef has injured consumers.

Likewise, if the news services and syndicates were required to license on a non-exclusive basis, there is no

reason to suppose that there will be lessened competition among newspapers. Newspapers will compete with each other on the basis of their selection and editing of the licensed material; since only a small portion of the output of the news services can be published, there can be considerable variety of choice once stories of general interest are covered. There would be enhanced competition with respect to materials to which the newspapers do not have shared access, i.e., each newspaper's own in-house writing talent. A limitation upon exclusive licenses from news services and feature syndicates need not extend to purchases of material from unsyndicated independent contractors.

On the other hand, if exclusive licenses are permitted, NYTNS's and LAT/WPNS's exclusive licenses to the Tribune and Sun-Times will result in other Chicago area newspapers carrying other supplemental news services because they are better than nothing. People who buy the other newspapers anyway will thus be exposed to stories and opinions that they would not otherwise have read. One could make an argument that this is a good thing as a matter of public policy—that the availability of information from diverse sources is a public benefit regardless of whether consumers particularly want it or not, just as it could be argued that consumers should be encouraged to try soy hamburgers. But it is not an argument from the economics of competition.

Defendants are correct that if exclusive licenses are permitted newspapers like the Daily Herald can compete on the basis of in-house reporting and writing. But according to Paddock's evidence, the public first looks to newspapers to supply comprehensive national and international news coverage; only after that expectation is

met do consumers compare newspapers on the basis of local news and commentary. Competition on the basis of in-house talent and local reporting cannot be effective competition because a newspaper that competes on that basis alone cannot survive. It is therefore far from clear that exclusive licensing promotes competition in the newspaper market.

Of course, cases such as *GTE Sylvania* and *Business Electronics*, which *Woodbury* purported to follow, accepted restrictions limiting competition at the reseller level because they promoted interbrand competition at the manufacturer level. By analogy, we should look for pro-competitive effects at the level of the suppliers—the news services and feature syndicates—rather than at the level of the newspapers. But the sort of justification for top-down vertical restraints that the Supreme Court found persuasive in *GTE Sylvania* and *Business Electronics* was missing in *Woodbury*, as it is missing here.

The Supreme Court in *GTE Sylvania* and *Business Electronics* accepted the argument that exclusive territories prevented dealers from scrimping on services and taking a "free ride" on services offered by competing dealers. This justification may exist in the newspaper setting, but it has not been explained what ancillary services a newspaper as a "dealer" in news and features must provide, or how non-exclusive licensing creates a "free rider" problem. According to J. Brad Bushell, Senior Vice President of United Media, a newspaper may demand exclusive rights before it invests money to promote a new feature. Bushell Decl. ¶ 9. But, as Paddock points out, a feature may be licensed after it has already become known and established, and in any event there is no reason for exclusivity to continue indefinitely. We also

doubt that this rationale applies to news services. Consumers buy a newspaper primarily for news in the first place; the defendants have offered no evidence that newspapers separately promote the news services whose stories they reprint.

It is possible that just as newspapers compete to subscribe to the best news services, the news services seek to be carried by large and prestigious newspapers for advertising and promotional reasons. Perhaps exclusive licensing is a necessary part of competition among them. But this is pure speculation.

A prime pro-competitive justification for exclusive licenses would be that exclusive licenses maximize the revenue of the syndicates and news services from their copyrighted materials. Competition among producers of news stories and features requires adequate compensation for producing them. But this justification was not adequately addressed in *Woodbury*. The court stated that if licenses were non-exclusive, a news service subscription would be less valuable to subscribing newspapers, "which would in turn affect the value of [LAT/WPNS] as a business." *Woodbury*, 616 F. Supp. at 510. But it is a *non sequitur* to assume that the effect would be adverse. A non-exclusive license will be less valuable to a newspaper than an exclusive one, but the licensor may be compensated by selling additional non-exclusive licenses to everyone else. Whether the outcome would be better or worse for the licensors is an open question *Woodbury* does not answer.[13]

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[13] A possible effect of non-exclusive licensing is that news services considered inferior would lose the market formerly

(continued...)

Here, although defendants have raised the justification of maximizing revenues, they have not shown the absence of a genuine issue of material fact. According to Bushell, "[e]xclusivity maximizes the value of features to the syndicate, the newspaper, and the creators who share in the revenues features generate." Bushell Decl. ¶ 8. This sort of conclusory statement is unpersuasive. Since it refers to syndicates generally, it is more in the nature of expert testimony than the recounting of facts known through personal experience. The court does not have to accept such opinions in the absence of the experience and reasoning behind them. See *Kenosha Liquor v. Heublein, Inc.*, 895 F.2d 418, 420 (7th Cir. 1990); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1339-40 (7th Cir. 1989).

Bushell also states that syndicates "often" provide a newspaper with exclusive rights, *id.* ¶ 7; by inference, sometimes they do not. Since it is hardly conceivable that a newspaper would prefer a non-exclusive license, there must be some situations in which the licensor does not see exclusive licensing as profit-maximizing. This is supported by memoranda generated within Bushell's organization, United Media, indicating that exclusivity

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[13] (...continued)
reserved to them—those newspapers excluded from the better services. Exclusive licensing guarantees the continued existence of at least one or two competitors to the leading news service in order to serve those markets having more than one newspaper. If all newspapers had access to the leading service, other supplementary news services might have to cut their prices to correspond to the marginal value they would provide, and might not survive. However, since the antitrust laws protect competition, not competitors, this would not be sufficient reason to preserve exclusive licensing.

was not to be given unless the subscriber demanded it. Pl. Exhs. 15, 16. Paddock has also submitted a letter written by the vice-president of Universal Press Syndicate, stating that it would prefer to license both the Chicago Tribune and the Gary, Indiana Post-Tribune. Def. Exh. 54.[14]

Charles Alan Leeds, president of LAT/WPNS, does provide a rationale, stating that the value of a news service's material resides in its uniqueness. Once an article has been published, other newspapers are unlikely to want it. Supplemental news services therefore protect the value of their copyrighted material by providing it on an exclusive basis to a single subscriber. Leeds Decl. ¶ 12.

Leeds may be correct, but his conclusion does not necessarily follow from his premise. An exclusive license does assure the licensee that the material has not been previously published in the licensee's exclusive area. However, if it is the possibility of previous publication (rather than simultaneous publication) that is to be avoided in order to preserve the value of the material, a non-exclusive licensee can avoid being "scooped" by another licensee by printing the material it wants as soon as the news service makes it available. Leeds does not state that newspapers are unwilling to purchase non-exclusive licenses from news services, or that the

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[14] Paddock also submitted an article discussing this lawsuit that appeared in Editor and Publisher for December 18, 1993 recounting that unnamed syndicate executives had stated that they would welcome an end to exclusivity. Pl. Exh. 107 at 47. This is inadmissible hearsay and has no place in a response to a summary judgment motion.

total return from non-exclusive licenses to all market participants would be less than the return from a single exclusive license.

According to Paddock's expert, exclusive licensing might or might not maximize the value of the materials furnished by the news services and feature syndicates depending upon the various elasticities of demand. Shepard Aff. ¶¶ 53, 54. The fact that news services and syndicates customarily grant exclusive licenses to major newspapers is evidence that exclusive licensing is believed to maximize their return, but we need not accept this as proof without some explanation of how the market works. Associated Press distributes its material on a non-exclusive basis, Def. SOF ¶ 12 (admitted), and has at least remained in business.

D. The "essential facility" theory

We have seen that vertical restraint analysis is inconclusive on this record, and if this were all, we would recommend that the defendants' motion be denied. However, we believe Paddock's claim fails for another, more fundamental reason not really discussed by the parties, namely that § 1 does not address the cumulative effect of independent vertical restraints in the absence of a horizontal conspiracy.

The defendants indirectly alluded to this limitation of § 1 in their discussion of the "essential facility" line of cases. These cases hold that a monopolist in control of a facility that cannot be replicated may be required to share it with competitors. See *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986); *MCI Communica-*

tions v. American Telephone and Telegraph Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983). For a monopolist to be liable under the essential facility doctrine, a plaintiff must show: (1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility. *MCI Communications*, 708 F.2d at 1133.

Paddock did not argue that its complaint fits this rubric, although the testimony of its expert, William G. Shepard, alludes to it. While access to either the NYTNS or the LAT/WPNS is alleged to be essential, obviously neither has a monopoly. Essential facility cases are generally brought under § 2 of the Sherman Act as attempts to monopolize; since here there are two independent, competing newspapers tying up two independent, competing news services, there can be no attempted monopoly.

Defendants cite *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1034 (7th Cir. 1988), for the proposition that when there are two independent suppliers of an input there can be no antitrust claim unless there is evidence of collusion between them. Flip Side was a concert promoter that claimed that the Rosemont Horizon, a very large "arena-level" theater in the Chicago area, was an essential facility and that the defendants' exclusive contract to produce concerts there violated § 1 and § 2 of the Sherman Act. The plaintiff contended that the University of Illinois' Pavilion, a smaller "arena-level" theater that was available to it, was not in the same class.

The district court granted summary judgment for the defendants on multiple grounds. The court found that the plaintiff (a) had failed to show that the Horizon was an essential facility rather than merely a desirable one, (b) had failed to prove an exclusive agreement that prevented it from booking the Horizon, and (c) had failed to show that the alleged exclusive agreement was intended to exclude competitors or had such an effect. *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, No. 82 C 3684 (N.D. Ill. April 22, 1986) (Moran, J.) (available on LEXIS).

There was an additional "arena-level" facility in Chicago, the Chicago Stadium, but it played no part in the court's decision. The plaintiff had argued that it was much less desirable, but did not support its contention with evidence. The court stated that even if there had been evidence that the Stadium was undesirable and not in the same class as the Horizon, summary judgment for the defendants was appropriate because the Pavilion was a suitable alternative to the Horizon and was available to the plaintiff. Id., LEXIS page 5.

The Seventh Circuit affirmed for the reasons stated by the district court, but added another. The plaintiffs had argued that the Stadium was not an available alternative because of another promoter's exclusive contract. This contention was not reflected in the district court's opinion and presumably was initially made on appeal. In response, the Seventh Circuit stated:

> Further, assuming Flip Side's best scenario, the defendants would still be entitled to summary judgment as a matter of law. Flip Side contended (1) that JAM and Tempo had exclusive control of the Horizon for the promotion of concerts, (2) that neither the

> Pavilion nor the Amphitheater (while open) reasonably duplicated the Horizon, and (3) that the Stadium was unavailable because another promoter had the exclusive concert promotion rights in that facility. Under these circumstances, absent collusion between JAM, Tempo, and the promoter of concerts at the Stadium, Flip Side failed to demonstrate an antitrust injury since competition for the concert-going consumer remained as the promoters controlling the Horizon and Stadium necessarily vied for the market. In other words, the Horizon was not a bottleneck (i.e., not an essential facility). Flip Side neither provided nor has our research discovered, authority for the proposition that two competitors, each holding exclusive rights to promote a product (here concerts) from competing facilities (here two arena-level facilities) constitutes a violation of the antitrust laws where a third competitor (Flip Side) becomes defunct. The record in this case reveals that Flip Side's business failure was probably the result of its principals' dishonest and criminal activity rather than the defendants' alleged anti-competitive conduct.

Flip Side, 843 F.2d at 1034.

Read narrowly, this statement can be taken as holding that the "essential facility" cases do not apply if there is more than one facility, even though all of them are unavailable to the plaintiff as a result of exclusive contracts.[15] According to *Flip Side*, the "essential facility" doctrine and its four-part test announced in MCI represents only a subset of Sherman Act violations, *Flip Side*,

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[15] But cf. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542-546 (9th Cir. 1991) (considering and ultimately rejecting an "essential facility" claim against two airlines, each of which maintained a computer reservation service).

843 F.2d at 1032, so failure to meet that test would not necessarily preclude a Sherman Act claim.

On the other hand, this statement can be taken as holding that as long as there is competition between two or more sources of an input (in this case concert hall facilities, an input needed to produce concerts), a would-be utilizer of that input has no antitrust claim of any kind.

The broad reading would require the dismissal of Paddock's complaint; the narrower reading would not.

This statement in *Flip Side* is problematic authority for this case. The court did not explain its reasoning, particularly its assumption that competition between two licensees obviated any consumer harm caused by the exclusion of a third, an assumption that, thanks to Dr. Shepard's affidavit, we may not make here. It did not take into account the difference noted here between a distributor of a product and a user of an input, and found no negative impact upon consumers resulting from the promoters' exclusive contracts.[16] The Stadium and its licensee were not parties, so the only relief the court could have granted would have been to deny one competitor exclusive rights to its theater, a manifestly unfair

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[16] It may be that concert promoters are mere middlemen and the consuming public can be offered the same artists or concerts through either promoter. If so, the exclusion of *Flip Side* might have had no impact on consumers; any performer the Chicago public was likely to want could be brought to Chicago by one of Flip Side's competitors. If, on the other hand, if Flip Side could produce concerts its competitors could not, the situation would be roughly comparable to the present case where excluding competing newspapers from a necessary input restricts consumer choices.

result. There is a further difference in that a limited number of concerts can be staged in a theater, but information can be replicated indefinitely; nonexclusive licensing poses no logistical problems.

E. Why § 1 is inapplicable here

Nevertheless, even if *Flip Side* does not compel the dismissal of Paddock's claim, we agree that parallel independent exclusive contracts between competitors and suppliers of an essential input do not violate § 1 even though they prevent the entry of additional competitors. Despite its breadth, § 1 is not a panacea for anti-competitive conditions no matter how they arise, and does not reach independent, non-collusive action by more than one market player that results in duopoly or oligopoly. This can be shown from two considerations.

First, although § 1 addresses multiple actors, they must be parties to a single contract or conspiracy. "Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." The statute does not address a restraint created by a plurality of contracts, independently entered into and not constituting a combination or conspiracy.

Zinser v. Rose, 868 F.2d 938 (7th Cir. 1989), supports this conclusion. *Zinser* involved twelve insurers who independently contracted with a firm of two chiropractors to review chiropractors' bills. The plaintiffs, chiropractors who billed insurers for their services, claimed that these "parallel" vertical agreements forced down prices in violation of § 1. The court held that in the absence of a horizontal conspiracy between the insurers themselves, the plaintiffs could not state a claim. Having their statements for chiropractors services reviewed by the same

firm was a good way to insure that one insurer did not pay more than others for the same services. Had they accomplished the same result by agreeing to limit the fees paid to chiropractors, the insurers would have violated § 1. Nevertheless, because each was entitled to decide with whom it would deal and what it would pay, there could be no antitrust violation without a horizontal agreement or conspiracy. The theory of "parallel" vertical agreements did not make unlawful jointly what was lawful individually.

The individual exclusive licenses here are not unlawful individually, and Paddock does not contend that they are. As was long ago pointed out, exclusion of purchasers is in the nature of contracts; in a sense, every contract is "in restraint of trade." If a seller agrees to sell goods to A, he cannot sell the same goods to B. Although transfer of information need not be exclusive, since information can be multiplied at little cost, Paddock does not contend that exclusive licensing is unreasonable per se. If there were six high-quality supplemental news services, Paddock presumably would not object to the Tribune or Sun-Times acquiring exclusive licenses to the news services they preferred. Even if there were only two such news services, if only one of them licensed exclusively, or if there were only one other general-interest newspaper in Chicago, Paddock would not be restrained from competing.

What allegedly made the newspapers' entering into exclusive contracts unreasonable, and hence unlawful, is that they both did so and there were no acceptable alternative sources. But § 1 addresses contracts and combinations, not markets as a whole. The only way § 1 could give Paddock the kind of relief it seeks would be if a

single contract made effective competition impossible. This would in effect be an "essential facility" claim, and Paddock would have to show that the individual newspaper licensee has monopoly power, not that both newspapers together do. This Paddock has not attempted, and on this record it cannot be done.

Second, we point out that the Sherman Act was and is a criminal statute. Anglo-American jurisprudence does not recognize joint criminal responsibility without joint participation in a criminal act or a common purpose to effectuate it. The drafters of the Sherman Act would not have anticipated that an innocent act undertaken for a proper business purpose could be made criminal because another actor subsequently took the same action for its own, independent business purpose.

CONCLUSION

We accordingly recommend that the defendants' motion to dismiss be **GRANTED** as to both counts of the complaint. Under 28 U.S.C. § 636(b)(1) the parties have 10 days from the date of service hereof to file written objections to this Report and Recommendation with Judge Nordberg. Failure to file such objections will normally waive the right to appeal the rulings set forth in this Report. *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

DATE: SEPTEMBER 26, 1994

Respectfully submitted,

RONALD A. GUZMAN
United States Magistrate Judge

[Dated October 23, 1995]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	
Plaintiff,	)	93 C 7493
v.	)	Judge David H. Coar
CHICAGO TRIBUNE COMPANY, CHICAGO SUN TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,	)	Magistrate Judge Ronald A. Guzman
Defendants.	)	

MEMORANDUM OPINION AND ORDER

United States District Judge John A. Nordberg previously referred the Defendants' Motion to Dismiss or in the Alternative for Summary to Magistrate Judge Ronald A. Guzman.[1] Magistrate Judge Guzman recommended that the Motion to Dismiss be granted but, as a contingency, recommended that the Motion in the Alternative

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[1] This case was reassigned to me by Order of the Executive Committee following my appointment to the bench.

for Summary Judgment be denied. Plaintiff, Paddock Publications d/b/a The Daily Herald ("Paddock" or "Daily Herald"), has filed its objections to the Report and Recommendation. The Magistrate Judge's Report and Recommendation and Paddock's objections thereto are now before this court for resolution. This court reviews Magistrate Judge Guzman's Report and Recommendation *de novo*. See 28 U.S.C. § 636(b)(1); Goffman v. Gross, 59 F.3d 668 (7th Cir. 1995). For the following reasons, this court adopts Magistrate Judge Guzman's recommended disposition and hereby dismisses the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Allegations of Complaint[2]

The Tribune, Sun-Times and Daily Herald are all "general interest newspapers" that provide their diverse readers with international, national, regional and local news and analysis, national and local sports reports, weather reports, and assorted syndicated features (*e.g.*, advice or opinion columns, comic strips *etc.*). (Compl., at ¶¶6-8, 17). The Tribune and Sun-Times dominate the Chicago metropolitan market for general interest newspapers, with approximate market shares of forty-two percent (42%) and thirty-percent (30%), respectively. The

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[2] In "Background Facts" of his Report and Recommendation, the Magistrate Judge intertwined the complaint's allegations with undisputed facts from the defendants' Local Rule 12(m) Statement. Since this court has elected to grant the defendants' Motion to Dismiss, it may only consider the allegations of the complaint. To avoid any confusion, this court sets forth herein the allegations of Paddock's complaint.

Daily Herald has a market share of approximately seven percent (7%). (*Id.* at ¶21). The relevant market for general interest newspapers in the Chicago metropolitan area includes Cook, Lake, DuPage, Kane, McHenry and Will Counties in Illinois, and Lake and Porter Counties in Indiana. (*Id.* at ¶20).

To compete with other general interest newspapers in the same market, a newspaper must be able to report extensively on international, national, regional and local affairs; cover national, regional and local sports events; and provide its readers with a number of the most popular syndicated columns, political cartoons, comics and other features. (Compl., at ¶18). To provide this coverage, general interest newspapers rely upon news services and syndicated features to supplement the work-product of their own staffs. (*Id.* at ¶23). Supplemental news services, such as defendants Los Angeles Times/Washington Post News Service, Inc. ("LAT/WPNS"), and the New York Times News Service ("NYTNS"), provide in-depth news coverage and analysis not provided by the Associated Press wire service or any other source. (*Id.* at ¶¶2, 9, 10, 23). Similarly, feature syndicates, such as the Tribune Media Services, Inc. ("Tribune Media"), Creators Syndicate ("Creators"), King Features Syndicate, Inc. ("King"), United Media ("UM"), Universal Press Syndicate ("UPS") and the Times/Mirror Company d/b/a Los Angeles Times Syndicate ("LAT Syndicate"), provide features such as political commentary and advice columns, comic strips and political cartoons. (*Id.* at ¶¶2, 11-16).

The two leading supplemental news services, NYTNS and LAT/WPNS, provide superior news reporting and analysis that cannot be obtained from other supplemental services. (Compl., at ¶¶2, 24). The Tribune has an

exclusive license to the NYTNS for the Chicago area market, and the Sun-Times has an exclusive license to the LAT-WPNS for the same market. (*Id.*). As a result of these exclusive licenses, the Tribune and Sun-Times prevent other general interest newspapers in substantial competition with them, including the Daily Herald, from obtaining access to NYTNS or LAT/WPNS's news analysis and reporting. (*Id.*). According to the Daily Herald, it must have access to either the NYTNS or LAT/WPNS to compete effectively with the Tribune and Sun-Times. (*Id.* at ¶24).

In addition, the Tribune and Sun-Times have exclusive licenses with Tribune Media, Creators, LAT Syndicate, and UPS to the most popular syndicated columns. (Compl., at ¶27). The Tribune and Sun-Times likewise have exclusive licenses with Tribune Media, Creator, King, UM and UPS to virtually all of the most popular comic strips. (*Id.* at ¶28). As a result of these exclusive licenses for syndicated features, the Daily Herald is denied access to the most popular syndicated columns and comic strips. (*Id.* at ¶¶27, 28). The Daily Herald contends that without access to these syndicated columns and features, it cannot compete effectively with, and indeed is at a severe disadvantage against, the Tribune or Sun-Times. (*Id.* at ¶¶26, 28).

The exclusive licenses held by the Tribune and Sun-Times to aforementioned supplemental news services and syndicated features are automatically renewed and thereby continue on a "perpetual" basis. (Compl. at ¶29). As a result, the Daily Herald is excluded from the market for leading supplemental news services and features. (*Id.*) It only has access to lesser quality supplemental news services and syndicated features not se-

lected by the Tribune or Sun-Times; the latter are available to all newspapers on a non-exclusive basis.[3] (*Id.* at ¶¶29, 38). The lesser quality news services are not reasonably effective substitutes for the NYTNS or LAT/WPNS. (*Id.* at ¶38).

The Daily Herald plans to extend its circulation area, which is presently concentrated in the Northwest and West suburbs of Chicago, throughout the entire Chicago suburban area. (Compl., at ¶ 22). To do so, it has improved those areas of its performance which it controls (*e.g.*, its reporting and editorial staffs, its sports and financial pages, and its production and distribution facilities). (*Id.* at ¶30). The one significant area which it cannot improve is the supplemental news service and syndicated features it would like to use. (*Id.*). The Daily Herald contends in this regard that the exclusive licenses held by the Tribune and Sun-Times significantly impede and restrain its ability to expand its circulation area.[4] (*Id.*). The Daily Herald further contends that the ability of the well-established Tribune and Sun-Times to compete does not depend upon exclusive access to the news services and syndicated features; accordingly, it concludes that the purpose of the exclusive licenses is to affect the content of other general interest newspapers in the relevant market. (*Id.* at ¶32).

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[3] Due to these non-exclusive licenses, the Tribune or Sun-Times may request any syndicated feature initially licensed by the Daily Herald. (*Id.* at ¶29).

[4] Although the Tribune and Sun-Times have waived their exclusive licensing rights for certain small suburban papers, they have refused to waive their exclusive rights when requested to do so by the Daily Herald. (*Id.* at ¶¶31, 37).

The Daily Herald also alleges that the Tribune and Sun-Times publish only a small percentage of the news copy made available to them by the NYTNS and LAT/WPNS. (Compl., at ¶¶25, 39). Since the Tribune and Sun-Times each hold the exclusive rights to the news copy that they respectively decline to publish, the exclusive licenses prevent the flow of significant opinion and news analysis to the readers in the Chicago area market. (*Id.* at ¶39, 40(b)). In addition, the Daily Herald alleges that the exclusive licenses obtained by the Tribune and Sun-Times adversely affect consumers, advertisers and competition in Chicago market by: creating unnatural barriers to entry of other general interest newspapers into the market; preventing competition among the Daily Herald, Tribune and Sun-Times "that would exist but for the readers desire to obtain news reports and features" only available in the Tribune or Sun-Times; depriving Daily Herald readers who do not wish to buy more than one paper of access to popular features unavailable to the Daily Herald;[5] and preventing further competition for advertisers. (*Id.* at ¶40(a), (c)-(e)).

The Daily Herald therefore contends that the cumulative effect of the exclusive licenses held by the Sun-Times and Tribune "has been to lessen competition substantially and to tend to create a monopoly" in violation of Section 7 of the Clayton Act. (Compl., at ¶42-43). The Daily Herald similarly contends that the exclusive licenses "individually and collectively have substantially

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[5] The Daily Herald alleges in this regard that to enter and compete effectively, it must overcome readers' loyalty to their current general interest newspaper because most readers of general interest newspapers purchase only one such newspaper each day. (Compl., at ¶19).

reduced competition" and therefore constitute unreasonable restraints of trade in violation of Section 1 of the Sherman Act. (*Id.* at ¶46). The Daily Herald requests that the court declare the exclusive licenses void and unenforceable and order the Tribune and Sun-Times to divest themselves of their exclusive licenses.

II. Standards

A motion to dismiss pursuant to Rule 12(b)(6) does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. *See* Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). The court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); *see also* Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). The court must accept as true all well-plead allegations and draw all reasonable inferences in favor of the plaintiff. Perkins v. Silverstein, 939 F.2d 463, 466 (7th Cir. 1991) (citing Scheuer, 416 U.S. at 236, 94 S. Ct. at 1686). However, the court need not strain to find favorable inferences which are not apparent on the face of the complaint. Coates v. Illinois St. Bd. of Educ., 559 F.2d 445, 447 (7th Cir. 1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. Nelson v. Monroe Regional Medical Ctr., 925 F.2d 1555, 1559 (7th Cir.), *cert. denied* 502 U.S. 903, 112 S. Ct. 285 (1991). Finally, the complaint does not need to specify the correct legal theory or point to the right

statute to survive a Rule 12(b) motion to dismiss, provided that "relief is possible under any set of facts that could be established consistent with the allegations." Bartholet v. Reishauer A.G., 953 F.2d 1073, 1078 (7th Cir. 1992). The complaint must, however, state either direct or inferential allegations concerning all material elements necessary for recovery under the chosen legal theory. *See* Glatt v. Chicago Park Dist., 847 F. Supp. 101, 103 (N.D. Ill. 1994).

III. Analysis

The Magistrate Judge observed, and this court agrees, that Paddock's antitrust theory is atypical. Paddock does not challenge the legality of each individual exclusive licensing agreement between the Tribune, the Sun-Times and the supplemental news services and syndications; rather, it argues that the *collective effect* of these exclusive licensing agreements has inhibited its ability to compete with the Tribune and Sun-Times because the exclusive licenses deny it access to better quality supplemental news services and more popular features and comics strips.[6] As alleged, however, Paddock's complaint

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[6] In paragraph 46 of its complaint, the Daily Herald alleges that the exclusive licenses have "individually and collectively" substantially reduced competition; however, the Daily Herald has not set forth a factual predicate to support its allegation that the exclusive licenses, viewed individually rather than collectively, substantially reduced competition. The complaint does not allege whether and how the exclusive licenses held by the Tribune (or Sun-Times) substantially reduce competition when viewed in isolation; rather, it is clear from the complaint that the alleged injury to competition only arises when the

(continued...)

fails to state an antitrust violation due to the omission of a crucial allegation.

Specifically, Paddock does not allege that the Tribune and Sun-Times colluded or otherwise conspired with each other to enter into the exclusive licensing agreements with the defendant supplemental news services or syndications for the purpose of stifling competition or acquiring monopoly power. It likewise does not allege that the defendant supplemental news services and syndications conspired among themselves or with the Tribune or Sun-Times to execute exclusive licensing agreements for the purpose of stifling competition among general interest newspapers. In the absence of allegations of either a vertical or horizontal conspiracy between the defendants, Paddock has effectively conceded that the Tribune, Sun-Times and defendant supplemental news services and syndications independently and lawfully entered into the individual exclusive licensing agreements that are now collectively at issue.

Accordingly, the issue is whether the Tribune, Sun-Times (both of whom compete against each other) and defendant supplemental news services and syndications

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[6] (...continued)
Tribune's exclusive licenses are viewed *in conjunction with* the Sun-Times exclusive licenses. Indeed, with the exception of the licensing agreements between the Tribune and NYTNS, and Sun-Times and LAT/WPNS, the complaint does not even identify which newspaper contracted with which syndicate for which feature or the terms and conditions of those individual contracts. Paddock's off-hand allegation that the exclusive licenses have *individually* reduced competition is therefore considered a legal conclusion, which the court has disregarded for the purposes of ruling on this motion to dismiss.

have violated section 1 of the Sherman Act and section 7 of the Clayton Act by independently (*i.e.*, non-collusively) entering into a series of exclusive licensing agreements which, although individually legal, have the cumulative effect of denying the Daily Herald access to better supplemental news coverage and more popular features and comics.

A. The Sherman Act Violation

Section 1 of the Sherman Act provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1. To state a claim under section 1, a plaintiff must allege "(1) a contract, combination or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc., 62 F.3d 967, 972 n.7 (7th Cir. 1995) (*quoting* Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)). In determining whether a section 1 violation has been properly pleaded, it is important to distinguish between concerted and independent action. "Section 1 of the Sherman Act requires that there be a 'contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. . . . Independent action is not proscribed. A manufacturer of course has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760, 104 S. Ct. 1464 (1984) (statutory citation omitted); *accord* MCM Partners, 62 F.3d at 972.

The Magistrate Judge concluded that Paddock's complaint did not state a claim under section 1 of the Sherman Act because "parallel independent exclusive contracts between competitors and suppliers of an essential input do not violate section 1 even though they prevent the entry of additional competitors. Despite its breadth, section 1 is not a panacea for anti-competitive conditions no matter how they arise, and does not reach independent, non-collusive action by more than one market player that results in duopoly or oligopoly." (Rep. & Rec., at 48). The Magistrate Judge further observed that "[Sherman section 1] does not address a restraint created by a *plurality* of contracts, independently entered into and not constituting a combination or conspiracy." *(Id.)* (emphasis in original).

Paddock strenuously objects to this conclusion as unfounded in the law. Paddock cites seven decisions from the United States Supreme Court, the Seventh and Ninth Circuits, and the Northern District of Illinois, which it contends establish that contracts allegedly in restraint of trade "are not to be considered individually but instead must be aggregated to assess their impact upon competition in the relevant market." With the exception of the Supreme Court's decision in Federal Trade Commission v. Motion Picture Advertising Service, 344 U.S. 392, 73 S. Ct. 361 (1953), the cases cited by Paddock establish that aggregation of individual exclusive licenses or contracts is appropriate where either a single entity has acquired or multiple entities acting together in concert have acquired monopoly power or otherwise

suppressed competition through the collective effect of exclusive agreements. The cases do not establish that a court can aggregate individual exclusive licenses or contracts lawfully and independently entered into by two competitors to establish the existence of an unreasonable restraint of trade in violation of the Sherman Act.

The first case cited by Paddock is Standard Oil Company of California v. United States, 337 U.S. 293, 69 S. Ct. 1051 (1949), where the government alleged that Standard Oil's practice of entering into and enforcing exclusive supply contracts with independent service stations violated section 1 of the Sherman Act and section 3 of the Clayton Act.[7] The record established that Standard Oil had exclusive supply contracts with 5,937 independent stations, or sixteen percent (16%) of the retail gasoline outlets in the relevant market. It further established that the amount of Standard Oil's sales through these independent stations as a percentage of the market's total sales essentially remained the same over the ten year period in which the exclusive supply agreements were in effect. Id. at 296-97, 69 S. Ct. at 1054. The issue before the court was the type of proof required to establish a violation of section 3 of the Clay-

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[7] Section 3 of the Clayton Act provides that it is unlawful for any person engaged in commerce to lease, sell or contract for the sale of goods "on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14.

ton Act.[8] Id. at 299, 69 S. Ct. at 1054. The court concluded that exclusive supply contracts "substantially lessen competition or tend to create a monopoly" in violation of section 3 when they foreclose competition "in a substantial share of the line of commerce affected." Id. at 314, 69 S. Ct. at 1062. Although the Court noted that other major gasoline suppliers also had exclusive supply contracts with independent service stations, it did not consider the collective effect of these other contracts in deciding whether competition had been substantially impaired. Rather, the Court concluded that Standard Oil violated section 3 of the Clayton Act based solely upon the aggregate effect of Standard Oil's exclusive supply contracts.[9] *See* id. Standard Oil simply does not autho-

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[8] The Court stated in this regard:

> The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be to substantially lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish.

Standard Oil, 337 U.S. at 299, 69 S. Ct. at 1055.

[9] In explaining its conclusion, the Court stated:

> It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. *Standard's use of such contracts creates just such a potential clog on competition as it was the purpose*

(continued...)

rize a court to consider the aggregate effects of competitors' exclusive contracts to establish an unreasonable restraint of trade in the absence of a conspiracy between the competitors. *See* Federal Trade Comm'n v. Motion Picture Advertising Serv., 344 U.S. 392, 399, 73 S. Ct. 361, 366 (1953) (Frankfurter, J., dissenting).

In Federal Trade Commission v. Motion Picture Advertising Service (hereinafter "*Motion Picture*"), the Supreme Court upheld a Federal Trade Commission decision in which the Commission concluded that exclusive contracts of more than one year in length between the respondent, a distributor of motion picture advertisements, and theatre owners governing the showing of those advertisements violated section 5 of the Federal Trade Commission Act, 15 U.S.C. section 45.[10] According to the Court, a "substantial" number of those contracts provided that the theatre owners may only display advertising films furnished by the respondent. Id. at 393, 73 S. Ct. at 362. The FTC had also brought similar complaints against three other distributors of motion picture advertisements; collectively, the respondent and

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[9] (...continued)

> *of section 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.*

Id. at 314, 69 S. Ct. at 1062 (emphasis added). Having thus found a violation of the Clayton Act, the Court did not consider whether Standard Oil's exclusive contracts also violated section 1 of the Sherman Act. Id.

[10] This statute provides in pertinent part that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are declared unlawful." 15 U.S.C. § 45(a)(1).

the other three distributors had exclusive agreements with seventy-five percent of the theatres in the United States that displayed advertising films before the main feature. Id. The FTC's complaints did not allege or contend that a conspiracy existed among the four distributors. In affirming the FTC's findings, the Supreme Court concluded:

> The Commission found in the present case that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly. Those findings are supported by substantial evidence. This is not a situation where by the nature of the market there is room for newcomers, irrespective of the existing restrictive practices. The number of outlets for the films is quite limited. And due to the exclusive contracts, respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets for this business throughout the United States. It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of section 5(a) of the Federal Trade Commission Act.

Id. at 395, 73 S. Ct. at 363-64.

Although the Supreme Court did consider the aggregate effect of the four distributor's exclusive contracts in determining whether the respondent violated section 5 of the Federal Trade Commission Act, the Court's decision offers no guidance as to whether, when and under what circumstances aggregation is appropriate. Importantly, the Court did not explain why it was appropriate to consider the aggregate effect of the four distributor's

exclusive contracts in the absence of a conspiracy and likewise did not cite to any authority to establish the legal basis for doing so. Justice Frankfurter, who authored the Supreme Court's opinion in Standard Oil, but dissented in this case, concluded that no such authority existed. He stated,

> While the existence of the other exclusive contracts is, of course, not irrelevant in a market analysis, *see Standard Oil Co. v. United States*, 337 U.S. 293, 309, 69 S. Ct. 1051, 1059, this court has never decided that they may, in the absence of a conspiracy, be aggregated to support a charge of Sherman Law violation. *Cf. id.*, at page 314, 69 S. Ct. at page 1062.

Motion Picture, 344 U.S. at 399, 73 S. Ct. at 366 (Frankfurter, J., dissenting). Despite this lack of authority, the Supreme Court simply adopted without analysis the FTC's decision to aggregate the effect of the four distributors' exclusive contracts, *compare* In re Reid H. Ray Film Indus., 47 F.T.C. 326, 335, 341 (1950); In re Alexander Film Co., 47 F.T.C. 345, 354, 360 (1950); In re United Film Ad Serv., Inc., 47 F.T.C. 362, 370-71, 377 (1950); In re Motion Picture Advertising Serv. Co., 47 F.T.C. 378, 387, 393 (1950), even though the FTC too failed to explain why it was appropriate or legally permissible to aggregate the effects of these distributors' exclusive contracts in the absence of a conspiracy between them. *See* id.

In addition to the glaring lack of a legal foundation, there are several other problems with the Court's decision in Motion Picture that argue against its having precedential value on the question of whether exclusive licenses independently (*i.e.*, non-collusively) held by competing firms can be aggregated to establish a Sherman

section 1 violation. First, Justice Frankfurter's dissent raises important questions about the sufficiency of the factual findings that underlie the FTC's decision and the extent and propriety of the Court's extensive deference to the FTC. *See* id. at 398-405, 73 S. Ct. at 365-68 (Frankfurter, J., dissenting). He further criticized the "dogmatic," conclusory legal analysis performed by the FTC and, in turn, uncritically adopted by the Court. *See* id. at 399, 73 S. Ct. at 365-66. Second, the nature and scope of the competition between the four distributors within the relevant market in Motion Picture are unknown. Although the FTC concluded that the distributors were in "substantial competition" within the national film advertising market, neither the FTC nor the Court addressed the nature or extent of competition between the four distributors within a more localized market—the type of market at issue here. It is thus unknown, for example, whether in a city with four theatres that showed advertisement films if each of the four distributors had an exclusive agreement with a different one of the four theatres such that the collective effect of the four separate exclusive contracts denied a fifth distributor access to those theatres (as Paddock alleges happened here) or if only one distributor had exclusive contracts with all four theatres. As a result, it is unknown whether the relevant market conditions at issue in Motion Picture are analogous or distinguishable from the case at bar. Third, despite controlling seventy-five percent of the market, both the Court and FTC concluded that the distributors' exclusive contracts with a duration of one year or less did not constitute "unfair methods of competition" under section 5 of the Act. Yet, the Court did not identify what percentage of the four

distributors' exclusive contracts had a duration of one year or less and were therefore legal. It similarly did not reconcile this finding with its conclusion that the exclusive contracts had sewn up the market and therefore fell "within the prohibitions of the Sherman Act." Finally, neither Paddock nor this court has found a decision involving an alleged violation of section 1 of the Sherman Act in which a court cited the Supreme Court's decision Motion Picture as authority for the position advocated here by Paddock. For all of these reasons, this court declines to aggregate the effects of the Tribune and Sun-Times' independently obtained exclusive licenses to establish a section 1 Sherman Act violation based upon the Motion Picture decision.

Paddock next cites Fortner Enterprises, Inc. v. United States Steel Corporation, 394 U.S. 495, 89 S. Ct. 1252 (1969), as authority for aggregating exclusive licenses to assess their effect on competition. Fortner, however, is unavailing since the respondents in that case, U.S. Steel and its wholly-owned subsidiary U.S. Steel Home Credit Corporation, agreed to tie or condition a borrower's ability to borrow amounts in excess of $ 2.0 million from U.S. Steel Home Credit Corporation to the purchase of prefabricated steel homes from U.S. Steel at inflated prices. The Court characterized the respondents' conduct as "primarily involving a tying arrangement of the traditional kind." Id. at 498, 394 S. Ct. at 1256. The case thus involved an antitrust violation substantively different from the allegedly illegal conduct of the defendants in this case. To that end, the respondents in Fortner did not use exclusive contracts, and the court did not have occasion to consider whether the cumulative effect of such contracts could be considered a Sherman

Act section 1 antitrust violation. The decision is further distinguishable because the alleged tying scheme necessarily involved some degree of collusion between U.S. Steel and its wholly-owned subsidiary, an allegation which is not present in this case. Finally, the language quoted by Paddock does not establish that it is appropriate to aggregate the effects of exclusive contracts to assess their effect on competition under section 1 of the Sherman Act.[11] Rather, the language quoted by Paddock, when read within its proper context, establishes that a court may consider the total volume of sales potentially affected by an alleged tying agreement to determine whether the tying agreement may be considered *per se* illegal because it, *inter alia*, affected a "not insubstantial" amount of commerce.

The Supreme Court's decision in Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416 (1945), likewise fails to support Paddock's position. In that case, the gov-

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[11] Paddock cited the following passage from the decision:

> A narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate in this context. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition. [Citation omitted.] For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit. . . .

Id. at 502, 89 S. Ct. at 1258.

ernment alleged that the Associated Press's By-Laws, which prohibited all AP members from selling news to non-members and which granted each member powers to block its non-member competitors from membership, violated the Sherman Act. Id. at 4, 65 S. Ct. at 1417. The By-Laws, to which all of the AP members had assented, both evidenced and provided the means for the members to "pool their power to acquire, to purchase, and to dispose of news reports through the channels of commerce," id. at 16, 65 S. Ct. at 1423, and thereby collectively secure an advantage over their rivals. Id. at 18, 65 S. Ct. at 1423. In light of this common agreement and purpose, the Court stated that it could not treat the case

> as though it merely involved a reporter's contract to deliver his news reports exclusively to a single newspaper, or an exclusive agreement as to the news between two newspapers in different cities. For such trade restraints might well be 'reasonable,' and therefore not in violation of the Sherman Act. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502. . . . But however innocent such agreements might be, standing alone, they would assume quite a different aspect *if utilized as essential features of a program to hamper or destroy competition*. It is in this light that we must view this case.

Id. at 14, 65 S. Ct. at 1421 (emphasis added). Unlike the newspaper publishers who assented to the AP By-Laws, Paddock has not alleged that the Tribune and Sun-Times (or, for that matter, any of the defendant news services and syndications) entered into or utilized the exclusive licenses as part of a concerted *program* to hamper or destroy competition. In the absence of any allegation that the exclusive licenses provided the Tribune and Sun-Times with the means to collectively pool their

power to control the flow of news coverage, the decision in Associated Press is inapposite.

The Ninth Circuit's decision in Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291 (9th Cir.), *cert. denied* 459 U.S. 1009, 103 S. Ct. 364 (1982), is also distinguishable. In Finley, the court concluded that Twin City Sportservice ("Sportservice") violated section 1 of the Sherman Act based upon its aggregate share of the relevant market and the pattern of conduct it used to obtain that market share. Id. at 1301-02. More specifically, the case began when Sportservice sued Finley in 1967 for breach of a 1950 concession contract provided for Finley's major league baseball club; Finley filed a counterclaim alleging that the contract violated sections 1 and 2 of the Sherman Act. Id. at 1296. The court defined the relevant market to include concessions franchises at "stadiums with major league baseball and/or football, arenas with major league basketball and/or hockey, arenas without major league sports, auto racing tracks, and certain amusement parks." Id. at 1297. The District Court concluded that Sportservice's exclusive dealing contract with Finley was an unreasonable restraint on trade because Sportservice controlled twenty-four percent of the relevant market and had engaged in a continuing pattern of conduct (*i.e.*, using unreasonably long concession franchise agreements, follow-the-franchise clauses, and predatory cash loans and advances) to produce that market share. Id. at 1301-02. Sportservice argued, however, that the court should only have looked to its single contract with Finley and thereby determined that Sportservice controlled less than one percent of the relevant market. Id. at 1302. The Ninth Circuit disagreed, concluding:

> [T]he issue is whether a district court, in assessing the antitrust liability of a defendant, may look to the overall effects of a defendant's conduct in the relevant market, or is limited to looking at the market implications of the one contract between the antitrust plaintiff and defendant. At least in the factual context of the instant litigation, we think the district court correctly assessed Sportservice's aggregate pattern of conduct in the relevant market.

Id.

Contrary to Paddock's contentions, Finley does not permit this court to consider the collective effect of two competitors' independent (*i.e.*, non-collusive) exclusive licenses to determine whether section 1 of the Sherman Act has been violated. First, the court in Finley considered the aggregate effect of a *single* franchise concessionaire's concession contracts rather than the aggregate effects of *two competitors'* independently executed exclusive contracts. Second, the court considered Sportservice's aggregate market share because it had engaged in a pattern of conduct whereby it obtained the market-share through unreasonable and predatory contract practices. Paddock does not allege that the Tribune or Sun-Times engaged in a similar, unreasonable pattern of conduct in entering into their respective exclusive licensing agreements with the other defendants. Third, the Finley court limited its conclusion to the "factual context of the instant litigation."

Paddock next contends that the Seventh Circuit in L.G. Balfour Co. v. FTC, 442 F.2d 1, 14-16 (7th Cir. 1971), also upheld "the aggregation of a defendant's exclusive dealing contracts as the basis for . . . a violation of the Federal Trade Commission Act." (Obj. Mem., at 7). Like

Finley, Balfour involved aggregating the exclusive dealing contracts of a *single* defendant (and its subsidiary) who had exclusive contracts with over 90% of all fraternities within the relevant market rather than aggregating the exclusive contracts independently obtained by *two competitors* competing in the same market.[12] Moreover, the court properly aggregated the defendant's exclusive contracts in Balfour since the FTC sought to establish that the defendant's market share, which amounted to 86.9% of the goods sold in the relevant market in 1960, evidenced monopoly power. See id. at 12, 14.

Finally, Paddock cites Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501 (N.D. Ill. 1988), where the district court, citing Finley, concluded that it was appropriate to look beyond the single contract between the plaintiff and defendant to the "entire pattern of contractual relations" that the defendant maintained. Id. at 1543. However, Hendricks is inapposite for the same reasons as Finley.

In sum, Paddock has failed to cite any authority to establish that two or more competitors' exclusive contracts can be aggregated in the absence of a conspiracy to support a violation of section 1 of the Sherman Act. Although the Seventh Circuit has not directly addressed this issue, its decision in Zinser v. Rose, 868 F.2d 938

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[12] For the purposes of Section 1 of the Sherman Act, the coordinated activity of a parent and its wholly owned subsidiary are viewed as the actions of a single entity due to their complete unity of interest. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769-71, 14 S. Ct. 2731, 2740-42 (1984).

(7th Cir. 1989), supports the conclusion that Paddock's complaint fails to state a cause of action.

In Zinser, nineteen licensed chiropractors alleged in their amended complaint that the defendants—twelve insurance companies, an insurance claims adjusting company and two chiropractors who jointly owned a consulting company ("PES")—had contracted to fix and lower the price of chiropractic services provided by the plaintiffs to the defendant insurance companies' insureds. The record established that the twelve insurance companies had independently contracted with PES to evaluate chiropractic bills submitted to the insurers. Id. at 939. The plaintiffs' amended complaint did not allege that the defendants horizontally conspired to fix the price of chiropractic services; rather, "the essence of the charge . . . is that each individual contract between PES and an insurance company is a vertical conspiracy affecting the chiropractic services in central Illinois." Id. The plaintiffs further alleged that each individual insurance company had the market power to affect the central Illinois market for chiropractic services since the market was particularly dependent upon the availability of insurance. Id. In affirming the district court's 12(b)(6) dismissal of the plaintiffs' claim, the Seventh Circuit concluded,

> [T]he Sherman Act does not preclude a party from unilaterally determining the parties with whom it will deal and the terms on which it will transact business. (citation omitted). *Without any additional allegations of abuse or horizontal conspiracy among the insurance companies, the arrangement plaintiffs describe fails to state a valid antitrust claim.*

Id. at 941 (emphasis added) (citations omitted). Although the nature of the contracts between the individual

insurance companies and PES and the alleged antitrust injury (*i.e.*, price fixing) resulting from those contracts differ from the exclusive licenses at issue here, the important parallel between this case and Zinser is that the antitrust injuries allegedly resulted from contracts independently (*i.e.*, non-collusively) entered into by competitors with a vertical provider of services. In this case, as in Zinser, a violation of section 1 of the Sherman Act cannot be found to exist in the absence of any collusion or conspiracy between the defendants.[13]

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[13] The court thus does not need to address whether the Tribune and Sun-Times's exclusive licenses constitute unreasonable restraints of trade under the Rule of Reason test.

Finally, the allegations of the complaint do not state a claim under the "essential facilities theory" (*see* Rep. & Rec., at 43-44), or under the theory of consciously parallel business behavior. *See* Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 207 (3d Cir. 1980). Consciously parallel business behavior, when coupled with other circumstances, may support an inference of an agreement. Id. at 208 (*citing* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 259 (1954)). To establish consciously parallel behavior, a plaintiff must show (1) that the defendants' business behavior was parallel; and (2) that the defendants were conscious of each other's conduct and that their awareness was an element in their decisional process. Id. Conscious parallelism, albeit some indication of a 'silent agreement,' is, by itself, insufficient circumstantial evidence from which to infer an antitrust violation. Before such an inference may be drawn, a plaintiff must also show (1) that the defendants acted in contradiction of their economic interests, and (2) that the defendants had a motive to enter into an agreement. Id.; Market Force Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1172 n.8 (7th Cir. 1990). Although Paddock's allegations may provide a motive to enter into such an agreement (*see* Compl., at ¶32), the allegations do not establish that the Tribune or Sun-Times acted in contradiction of their economic

(continued...)

Accordingly, Count II is dismissed.

B. The Clayton Act Violation

For principally the same reasons, Paddock's complaint fails to allege a violation of section 7 of the Clayton Act.

Paddock argues that the combined effect of the separate exclusive licensing agreements between the Tribune and NYTNS and between the Sun-Times and LAT-WPNS lessens competition in violation of Section 7 of the Clayton Act. Section 7 of the Clayton Act states in pertinent part:

> No person engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

15 U.S.C. § 18.

The Magistrate Judge recommended that Paddock's Clayton Act section 7 claim be dismissed for two reasons: first, because the exclusive licenses were of short-term duration (*i.e.*, five years or less), the Tribune and Sun-Times did not "acquire assets" within the meaning or purpose of section 7 when they entered into the exclusive

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[13] (...continued)

interests. Without such an allegation concerning the Tribune or Sun-Times, the consciously parallel business behavior theory is unavailing.

licensing agreements; and second, the Daily Herald's complaints about the exclusivity of the licenses was beyond the reach of section 7. (Rep. & Rec., at 22). In determining whether the Magistrate Judge properly concluded that Paddock's complaint failed to state a section 7 violation, it is important to review briefly the theory underpinning Paddock's claim. Paddock does not allege that a specific individual license acquired by the Tribune (or Sun-Times) violates section 7 because the acquisition of that license, when viewed within the context of the entire market and the exclusive licenses held by other competitors, would substantially reduce competition. Rather, Paddock contends that *all* of the exclusive licenses held by the Tribune and Sun-Times, when viewed in the *aggregate*, substantially injure competition in violation of section 7. *See* Compl., at ¶42-43. It is equally important to note that Paddock's prayer for relief seeks rescission of *all* of the exclusive licenses held by the Tribune and Sun-Times, rather than requesting the court to rescind individual licenses on a case-by-case basis until a threshold is reached where the remaining exclusive licenses would not "substantially" affect competition.

Even if the exclusive licenses are perpetual (as alleged) and therefore may be considered "assets," see Chateau de Ville Productions, Inc. v. Trans-Witmark Music Library, Inc., No. 76 C 2788, 1977 WL 1370 (S.D.N.Y. 1977) (Duffy, J.) (exclusive licenses of copyrighted material are "assets" covered by section 7), the Magistrate Judge properly concluded that section 7 of the Clayton Act was not intended to address the type of claim advanced by Paddock. *See* Rep. & Rec., at 20-22. Moreover, Paddock has not cited a case where a section 7 violation resulted

from the *collective* effect of non-collusive conduct by two competitors rather than from the acquisition of a single asset (or series of assets) by a single entity or group of entities acting together in concert.

In Ford Motor Company v. United States, 405 U.S. 562, 92 S. Ct. 1142 (1972), cited by Paddock, the Supreme Court reviewed Ford's acquisition of an Autolite spark plug plant within the context of the entire spark plug market to determine whether that single acquisition would substantially reduce competition in violation of section 7. Prior to the acquisition, the market consisted of two major independent spark plug producers, Autolite and Champion, and two significant purchasers of original equipment spark plugs, Ford and Chrysler. *See* id. at 570, 92 S. Ct. at 1148. General Motors manufactured its own spark plugs under the AC brand. Id. at 566, 92 S. Ct. at 1146. The Court concluded that Ford's acquisition of Autolite violated Clayton section 7 because it "aggravated an already oligopolistic market." The Court further concluded that the appropriate remedy was for Ford to divest itself of the Autolite acquisition. Id. at 574, 92 S. Ct. at 1150. The Ford Motor Company decision is thus a classic example of a Clayton section 7 violation and remedy. As previously demonstrated, however, the theory underpinning Paddock's Clayton Act section 7 claim and proposed remedy bears absolutely no relationship to the type of conduct giving rise to a section 7 violation in Ford Motor Company or the relief afforded in that case.[14]

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[14] United States Steel Corporation v. Federal Trade Commission, 426 F.2d 592 (6th Cir. 1970), also fails to support Paddock's Clayton Act section 7 claim since that case involved the acquisition of a single cement company by U.S. Steel, which

(continued...)

In the end, the absence of an alleged conspiracy prevents Paddock from stating a claim for either a section 1 Sherman Act violation or a section 7 Clayton Act violation. The notion that lawful, non-collusive conduct by the Tribune added to lawful, non-collusive conduct by the Sun-Times produces in the aggregate an unlawful effect requiring divestiture of otherwise legal exclusive licensing agreements simply makes no sense. Accordingly, Paddock's Clayton Act section 7 claim is also dismissed.

WHEREFORE, for the foregoing reasons, the defendants' Motion to Dismiss is granted. Plaintiff is granted leave to file an amended complaint on or before November 13, 1995.

ENTER:

David H. Coar
U.S. District Judge

Dated: October 23, 1995

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[14] (...continued)
was one of the nation's four largest manufacturers of portland cement prior to the acquisition, in an industry where the trend had been towards vertical integration.

[Dated April 3, 1996]

ORDER

In its original complaint, Paddock alleged that the defendants' exclusive licenses "individually and collectively have substantially reduced competition." (Compl., at ¶ 46). Because Paddock failed to allege a factual predicate to support its claim that the licenses "individually" reduced competition, this court disregarded that portion of the allegation for the purposes of ruling on the motion to dismiss. (Mem. Op. at 7-8 n.6). However, the court considered and ultimately rejected Paddock's remaining claim that the exclusive licenses "collectively" reduced competition. To that end, the court concluded that the complaint did not state a Sherman § 1 or Clayton § 7 violation because it failed to allege that the Tribune, Sun Times and defendant supplemental news services and features syndicates conspired, colluded or otherwise agreed to use exclusive licensing agreements to thwart competition. In the absence of such an allegation, this court concluded that Paddock could not rely on the aggregate effects of two competitors' independent exclusive licensing agreements to establish an antitrust violation. (*Id.* at 22, 25). The court hereby reaffirms its ruling.

In the amended complaint, Paddock now seeks to revive its previously improperly pleaded claim that the exclusive licensing agreements individually (rather than collectively) stifled competition. To that end, Paddock alleges that the exclusive licenses between the Tribune and NYTNS, and between the Tribune and certain feature syndicates (*i.e.*, Tribune Media, Creators, King, NYTSC, LAT Syndicate, United and Universal) "have, on

an aggregate basis, suppressed competition and injured consumers" by, *inter alia*, creating unnatural barriers to entry and denying Paddock access to a vital source of high quality news reporting for which it "has no available substitute." (Am. Compl. at ¶¶ 44-45, 57, 59). Paddock repeats the same allegations in separate claims against the Sun Times. (*Id.* at ¶¶ 53-55, 61-63).

Paddock's amended complaint simply repackages its collective aggregation antitrust theory under the guise of aggregating each competitor's individual exclusive licenses. For example, Paddock's claim that the Tribune's independent exclusive license with the NYTNS "in itself" restrains trade or substantially lessens competition implicitly depends upon the Sun Times' independent exclusive license with the LAT-WPNS. But for the Sun Times' exclusive license with LAT-WPNS, Paddock cannot allege that the Tribune's exclusive NYTNS license leaves it with "no available substitute." The same "but for" reasoning is true with respect to Paddock's claim that the Sun Times' exclusive license with LAT-WPNS leaves it with "no available substitute." Paddock's alleged antitrust injury thus only arises when its two competitors' independent exclusive licensing agreements are aggregated. The same problem applies to Paddock's attempts to aggregate separately the Tribune and Sun Times' exclusive licenses with the feature syndicates. (The court notes parenthetically that the amended complaint still lacks a properly developed factual predicate—instead of identifying which feature syndicate provides which comic or feature to the Tribune or Sun Times pursuant to which licensing agreement, Paddock simply lumps the Tribune and Sun Times' contracts together. To challenge properly the aggregate effect of the Tribune or

Sun Times' individual exclusive licensing agreements, Paddock should have separately set forth specific allegations relating to *each* licensing agreement and identified how each of the Tribune's [or Sun Times'] successive licensing agreements cumulatively affected competition.) As before, in the absence of any allegation of collusion between the Tribune and Sun Times or between the various supplemental news and features services, the Tribune and Sun Times' independent exclusive licensing agreements *cannot* be aggregated to manufacture an antitrust violation.

Accepting Paddock's invitation, the court hereby dismisses the amended complaint with prejudice "so that an appeal can be taken without any further delay." (*See* Pl. Resp. Mem. at 3).

s/ David H. Coar

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

Paddock Publications

-v-

CASE NUMBER: 93 C 7493

Chicago Tribune Company, et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Joint Motion of defendants to dismiss amended complaint is Granted. No other matters pending in this case, this case is terminated.

April 9, 1996
Date

H. Stuart Cunningham
Clerk

s/ Patricia McQurter-Figgs
(By) Deputy Clerk

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[Dated December 13, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	
Plaintiff,	)	
v.	)	Civil Action No. _____
CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC. NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC. TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,	)	
Defendants.	)	

COMPLAINT

Nature of the Case

1. Plaintiff Paddock Publications, Inc. ("Paddock Publications"), the publisher of the *Daily Herald*, a daily general interest newspaper, brings this civil action against the defendants named herein for injunctive relief to prevent continuing injury to Paddock Publications and the public from defendants' violations of Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 1 of the Sherman Act, 15 U.S.C. §1.

2. The defendants include Chicago Tribune Company and Chicago Sun-Times, Inc., the publishers of the daily general interest newspapers with the largest circulations in the Chicago metropolitan area; the New York Times Syndication Sales Corporation and the Los Angeles Times/Washington Post News Service, Inc., which supply the two leading supplemental news services; and the leading syndicators of newspaper features. Supplemental news services provide newspapers throughout the country with in-depth news coverage and analysis not available from any other source, such as the Associated Press wire service. Features syndicators similarly provide newspapers with features such as political commentary columns, advice columns, political cartoons, and comics. The defendant supplemental news services and newspaper features syndicators have entered into exclusive license agreements with Chicago Tribune Company and Chicago Sun-Times, Inc. that prevent the *Daily Herald* from publishing material from the two leading supplemental news services and the most popular newspaper features. There are no adequate substitutes available to the *Daily Herald*. As a result, competition between the *Daily Herald* and the dominant general interest newspapers in the Chicago area, the *Chicago Tribune* and the *Chicago Sun-Times*, has been and continues to be unlawfully restrained.

Jurisdiction and Venue

3. This action is filed under Section 16 of the Clayton Act, 15 U.S.C. §26, for injunctive relief against threatened loss and damage by violations of the antitrust laws.

This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337.

4. Each of the defendants named in this Complaint maintains an office, transacts business or is found within the Northern District of Illinois, and each of the defendants is within the jurisdiction of this Court for the purpose of service of process. The interstate trade and commerce described herein is carried on, in part, within the Northern District of Illinois. Defendants have committed and continue to perform unlawful acts within the Northern District of Illinois that restrain trade and substantially lessen competition and have a harmful effect on consumers.

5. This action may be brought in this District pursuant to 15 U.S.C. §§ 4, 22, and 26 and 28 U.S.C. §1391 because the defendants are found or transact business or are doing business in this District and/or the claim arose in this District.

Plaintiff

6. Paddock Publications is a Delaware corporation with its principal place of business at 217 West Campbell Street, Arlington Heights, Illinois 60006. Paddock Publications owns and publishes the *Daily Herald*, a general interest newspaper with both daily and Sunday editions (the "*Daily Herald*"), which Paddock sells and distributes in the Chicago metropolitan area. Paddock Publications purchases a substantial volume of supplies and services in interstate commerce.

Defendants

7. Defendant Chicago Tribune Company (the "*Tribune*") is an Illinois corporation engaged in interstate commerce with its principal place of business at 435 North Michigan Avenue, Chicago, Illinois 60611. The *Tribune* owns and publishes the *Chicago Tribune*, a general interest newspaper with both daily and Sunday editions, which is sold and distributed throughout the Chicago metropolitan area. The *Tribune* purchases a substantial amount of materials, supplies and services in interstate commerce including supplemental news services and syndicated features. The *Tribune* also sells a substantial volume of newspapers and services in interstate commerce.

8. Defendant Chicago Sun-Times, Inc. (the "*Sun-Times*") is a Delaware corporation engaged in interstate commerce with its principal place of business at 401 North Wabash Avenue, Chicago, Illinois 60611. The *Sun-Times* owns and publishes the *Chicago Sun-Times*, a general interest newspaper with both daily and Sunday editions, which the *Sun-Times* sells and distributes throughout the Chicago metropolitan area. The *Sun-Times* purchases a substantial volume of supplies and services in interstate commerce and sells a substantial volume of newspapers and services in interstate commerce.

9. Defendant New York Times Syndication Sales Corporation ("N.Y. Times Syndication Sales") is a Delaware corporation with its principal place of business at 130 Fifth Avenue, New York, New York 10011. N.Y. Times Syndication Sales sells in interstate commerce the New York Times News Service ("NYTNS"), a supplemental news service, and the New York Times Graphics Service

("NYTGS") to newspaper companies throughout the country including the *Tribune*. Subscribers to NYTNS and NYTGS obtain news reports and commentary published in the *New York Times* and other major newspapers as well as other syndicated features.

10. Defendant Los Angeles Times/Washington Post News Service, Inc. ("LAT-WPNS") is a corporation organized under the laws of the District of Columbia with its principal place of business at 1150 15th Street, N.W., Washington, D.C. 20071. LAT-WPNS sells its supplemental news service in interstate commerce to newspaper companies throughout the country, including the *Sun-Times*. Subscribers to LAT-WPNS obtain news reports and commentary published in the *Los Angeles Times* and *Washington Post* as well as other syndicated features and news services.

11. Tribune Media Services, Inc. ("Tribune Media") is a Delaware corporation with its principal place of business at 435 North Michigan Avenue, Chicago, Illinois 60611. Tribune Media sells syndicated features, such as the Dave Barry column, in interstate commerce to newspaper companies, including the *Tribune*.

12. Defendant Creators Syndicate ("Creators") is a Delaware corporation with its principal place of business at 5777 West Century Blvd., Los Angeles, California 90045. Creators sells syndicated features, including the "B.C." and "Wizard of Id" comics, in interstate commerce to newspaper companies, including the *Tribune* and the *Sun-Times*.

13. Defendant King Features Syndicate ("King") is a New York corporation with its principal place of business at 216 East 45th Street, New York, New York 10017.

King sells syndicated features, including the "Blondie" and "Hagar the Horrible" comics, in interstate commerce to newspaper companies throughout the country including the *Tribune* and the *Sun-Times*.

14. Defendant Times Mirror Company d/b/a Los Angeles Times Syndicate ("LAT Syndicate") is a Delaware corporation with its principal place of business at Times Mirror Square, Los Angeles, California 90053. LAT Syndicate sells syndicated features, including the Paul Greenberg and Mike Downey columns, in interstate commerce to newspaper companies throughout the country, including the *Tribune*.

15. Defendant United Media ("United") is a Delaware corporation with its principal place of business at 200 Park Avenue, New York, New York 10166. United sells syndicated features, including the "Peanuts" and "Garfield" comics, in interstate commerce to newspaper companies throughout the country including the *Tribune* and the *Sun-Times*.

16. Defendants Universal Press Syndicate ("Universal") is a Delaware corporation with its principal place of business at 4900 Main Street, Kansas City, Missouri 64112. Universal sells syndicated features, including the "Dear Abby" advice column and the "Doonesbury," "Cathy," and "Calvin & Hobbes" comics, in interstate commerce to newspaper companies throughout the country including the *Tribune* and the *Sun-Times*.

Nature of Trade and Commerce

Nature of the Market for General Interest Newspapers

17. General interest newspapers provide their readers with international, national, regional and local news reports and analysis, national and local sports reports and commentary, weather reports, and syndicated features including columns that provide commentary, advice or opinions on a variety of subjects, comic strips, political cartoons, and puzzles. General interest newspapers are designed to appeal to a broad spectrum of readers with differing interests and needs for information. Because of transportation costs, the need to deliver news on a rapid basis, the need to attract local advertisers, and the need to cover regional and local news and sports, the business of creating and selling general interest newspapers in the United States is inherently local in nature. As a result, general interest newspapers designed for readers living and working in one metropolitan area are not adequate substitutes for newspapers designed for readers living and working in another metropolitan area.

18. To compete with other general interest newspapers in the same market, a newspaper must be able to report extensively on international, national, regional and local affairs; cover national, regional and local sports events; and provide its readers with a number of the most popular columns, political cartoons, comics, and other features.

19. Natural barriers to entry into any given geographical market for general interest newspapers are very high. To enter into such a market and compete effectively, it is necessary at a minimum to develop reporting and

editing staffs for regional and local news and sports, obtain access to high-quality international and national news reporting and popular syndicated features, acquire production facilities and presses, develop a distribution system capable of delivering papers on a timely basis, and continuously solicit subscribers and advertisers. To enter the market and compete effectively, it is also necessary to overcome readers' loyalty to their current general interest newspaper because most readers of general interest newspapers purchase only one such newspaper each day.

20. The sale of general interest newspapers in the Chicago metropolitan area including Cook, Lake, DuPage, Kane, McHenry, and Will Counties in Illinois and Lake and Porter Counties in Indiana (the "Chicago Area Market") constitutes a relevant market under the federal antitrust laws.

21. The Chicago Area Market for general interest newspapers is dominated by the *Tribune*, with a market share of approximately 42%, and the *Sun-Times* with a market share of approximately 30%. The *Daily Herald*, the strongest and most popular general interest newspaper competing with the *Tribune* and the *Sun-Times*, has a market share of approximately 7%.

22. The *Daily Herald*'s circulation is now concentrated in the Northwest and West suburbs of Chicago, comprising parts of Cook, Lake, DuPage, McHenry, and Kane Counties. The *Daily Herald* plans to extend its circulation area throughout the entire Chicago suburban area, but the defendants' exclusive licenses challenged by this Complaint significantly impede and restrain its ability to do so.

The Leading News Services

23. In order to publish a general interest newspaper and to augment the product of their own staffs, the *Tribune*, the *Sun-Times*, and the *Daily Herald* obtain supplemental news services and features that are distributed by syndicators.

24. The NYTNS and the LAT-WPNS provide news reporting and analysis of a scope and quality that cannot be obtained from other available news services. The *Tribune* has an exclusive license to the NYTNS in the Chicago Area Market, and the *Sun-Times* has an exclusive license to the LAT-WPNS in the Chicago Area Market. These exclusive licenses enable the *Tribune* and the *Sun-Times* to prevent newspapers in substantial competition with them, such as the *Daily Herald*, from obtaining access to the news reporting and analysis provided by NYTNS and LAT-WPNS. Access to at least one of these two services is essential to enable the *Daily Herald* to provide the comprehensive and authoritative news reporting necessary to attract a large readership with diverse interests and to compete effectively with the *Tribune* and the *Sun-Times* in the sale of general interest newspapers in the Chicago Area Market. In addition, supplemental news services provided by other newspapers (such as Hearst Newspapers News Service, Newhouse News Service, and Gannett News Service) have become exclusively affiliated with the NYTNS or LAT-WPNS, and as a result of the *Tribune*'s exclusive license to the NYTNS and the *Sun-Times*' exclusive license to the LAT-WPNS, the *Daily Herald* is denied access to these other supplemental news services as well.

25. The *Tribune* publishes little of the copy made available to it by the NYTNS, and the *Sun-Times* publishes a small percentage of the copy made available to it by the LAT-WPNS. The material from those news services that is not published by the *Tribune* and the *Sun-Times*, respectively, is unavailable to most readers in the Chicago Area Market.

Syndicated Columns

26. Collectively, Tribune Media, Creators, LAT Syndicate and Universal control many of the most popular syndicated columns published in the United States. To attract a large readership with diverse interests and compete effectively in selling general interest newspapers, it is necessary to have access to the syndicated columns controlled by Tribune Media, Creators, LAT Syndicate and Universal.

27. The *Tribune* and the *Sun-Times* have exclusive licenses in the Chicago Area Market to the most popular syndicated columns controlled by Tribune Media, Creators, LAT Syndicate and Universal, which prevent newspapers in substantial competition with the *Tribune* and the *Sun-Times*, such as the *Daily Herald*, from publishing such columns. The unfairness in the Chicago Area Market of these exclusive licenses is demonstrated by the fact that the *Tribune*, which publishes the personal advice column by Ann Landers, whom defendant Creators, her syndicator, describes as "the most widely syndicated columnist in the world with 90 million daily readers," also has an exclusive license to the "Dear Abby" personal advice column by Abigail Van Buren, which defendant Universal characterizes as "the most widely

syndicated column in the world" written by "America's premier advice columnist for more than 35 years." (Editor & Publisher, Syndicate Directory Section for 1993, pp. 97S, 115S (July 31, 1993).)

Syndicated Comics

28. Collectively, Tribune Media, Creators, King, United, and Universal control virtually all of the most popular syndicated comics published in the United States. Considered together the *Sun-Times* and the *Tribune* have exclusive licenses in the Chicago Area Market to virtually all of the popular comics controlled by Tribune Media, Creators, King, United and Universal and a broad range of other comics. For instance, the *Tribune* and the *Sun-Times* have exclusive licenses to the 12 most popular comics. These licenses prevent newspapers in substantial competition with the *Tribune* and the *Sun-Times*, such as the *Daily Herald*, from obtaining access to such comics. A newspaper such as the *Daily Herald* that is denied access to the most popular comics controlled by Tribune Media, Creators, King, United and Universal is at a severe disadvantage if it attempts to compete in any market for the sale of general interest newspapers with newspaper companies such as the *Tribune* and the *Sun-Times* that are able to publish such popular comics.

Effects of the Exclusive Licenses

29. The exclusive licenses obtained by the *Tribune* and the *Sun-Times* over the supplemental news services, columns, political cartoons, and comics described above

are automatically renewed, continue on a perpetual basis, and deny the *Daily Herald* the opportunity to obtain access to them. However, the *Daily Herald* is not granted exclusivity with respect to any feature it licenses from the defendant syndicators, and therefore any syndicated feature initially licensed to the *Daily Herald* is available to the *Tribune* or the *Sun-Times* merely upon their request. The effect of these exclusive licenses is to exclude the *Daily Herald* from the market for the leading supplemental news services and features.

30. Competition should be encouraged among general interest newspapers serving the same market through the efforts of their own reporters, editors, columnists, cartoonists, and other employees and the quality and scope of their own work product. In its efforts to broaden the area of its competition with the *Tribune* and the *Sun-Times* and to attract readers away from them, the *Daily Herald* has improved those areas of its performance which it controls: for example, its reporting and editorial staffs, its sports and financial pages, and its production and distribution facilities. The one significant area which it cannot improve is the supplemental news services and syndicated features that it wishes to use; indeed, it is foreclosed from access to the materials it wants and needs. Consequently, the practice of exclusively licensing supplemental news services and features in the Chicago Area Market to the *Tribune* and the *Sun-Times* enables them to obtain a critical, but unfair and unlawful advantage over the *Daily Herald*. Exclusive licensing forecloses the *Daily Herald*'s access to supplemental news services and features which the *Tribune* and the *Sun-Times* had no role in creating and which they obtain merely by paying license fees.

31. Although the *Tribune* and the *Sun-Times* rigidly enforce the exclusivity of their licenses whenever the *Daily Herald* asks for a waiver, they have allowed daily newspapers that compete with the *Daily Herald* in Aurora, Elgin, Crystal Lake, and Waukegan, Illinois, to publish some of the supplemental news services and syndicated features in question. For instance, the *Sun-Times* has not prevented the *Northwest Herald*, a daily newspaper in Crystal Lake, Illinois, from using the LAT-WPNS, and the Aurora *Beacon-News* and the Waukegan *News-Sun* use the NYTNS despite the *Tribune*'s exclusive license that prevents the *Daily Herald* from using it. As a result, the *Daily Herald* unfairly faces competition not only from the *Tribune* and the *Sun-Times*, but also from the suburban dailies that have access to at least some of the syndicated material that the *Daily Herald* seeks but has been denied.

No Justification for These Restraints of Trade

32. The defendants have no justification for the restraints of trade caused by these exclusive syndication licenses. The *Tribune* and the *Sun-Times* provide little if any promotion or other services in reliance upon exclusive publication rights to the news services or features in question. The success and popularity of the news services and features in question is well established, and thus the *Tribune* and the *Sun-Times* assume no risk in obtaining licenses to them. The license fees paid by the *Tribune* and the *Sun-Times* for these exclusive licenses are a small fraction of their production costs. Moreover, the *Tribune* and the *Sun-Times* have been publishing their newspapers in the Chicago Area Market for many years,

and each sells several hundred thousand copies each day. Their ability to compete with one another and the *Daily Herald* does not depend upon having exclusive access to these news services and features. Invalidating these exclusive licenses would not affect the material that the *Tribune* and the *Sun-Times* publish. These exclusive licenses affect only the contents of the other newspapers in the market, most notably the *Daily Herald*, and that is their very purpose.

33. Any attempt to justify the exclusivity of the licenses in question by the so-called "20% rule" is invalid. In 1975 the United States District Court for the Southern District of New York approved the settlement between the United States Government and the Globe Newspaper Company (known as the "*Boston Globe* Consent Decree") of the Government's complaint that exclusive licenses to features violate the federal antitrust laws. United States v. Chicago Tribune-New York News Syndicate, Incorporated and Globe Newspaper Company, et al., 67 Civ. 4596, 4597, and 4598 (S.D.N.Y.). One of the terms of the settlement was that the *Globe* could not enforce any exclusive license to a syndicated feature in any county in which its morning and afternoon circulation together was less than 20% of the households in the county or its total daily circulation was less than 5,000 copies. The District Court stressed that "[t]he settlement reflected in this judgment establishes no nation-wide procrustean formula. . . . This formula is not intended as a yardstick by which syndicates may measure their contracts with other newspapers." (Opinion filed by Judge Edmund L. Palmieri, July 16, 1975, at p. 4.) The settlement also had no applicability whatever to supplemental news services. Yet the defendant supplemental news ser-

vices, features syndicators, and newspapers have attempted to use the *Boston Globe* Consent Decree as an excuse for their anticompetitive exclusive licenses. Because the *Daily Herald* is located in Cook County, where the *Tribune* and the *Sun-Times* are also based, the defendants have used the so-called "20% rule" as a device to foreclose the *Daily Herald* from access to the leading supplemental news services and features. The LAT-WPNS, for instance, has expressly refused to license the *Daily Herald* to use its material in Cook County unless the *Sun-Times* waives its exclusive, and the *Sun-Times* has refused to do so. This unlawful prohibition of use in Cook County as a practical matter prevents the *Daily Herald* from using the LAT-WPNS in any county in which it is circulated. Therefore, the *Boston Globe* Consent Decree, a settlement approved by the Court as a pro-competitive step in one market to reduce the extent of the exclusive licenses over syndicated features, with no intended impact on any other newspaper market, has been used perversely as a rationale for maintaining broad, anticompetitive exclusives in the Chicago Area Market.

34. The *Daily Herald* has asked the defendants to cease violating the federal antitrust laws and to allow it to use the NYTNS, the LAT-WPNS, and to publish the newspaper features now subject to exclusive licenses to the *Tribune* or *Sun-Times*. However, the defendants have not voluntarily ended their antitrust violations and continue to deny the *Daily Herald* the right to use the supplemental news services and to publish the features in question.

Violations Charged

35. The *Tribune* has entered into contracts with the N.Y. Times Syndication Corp., Creators, King, LAT Syndicate, United and Universal whereby it has acquired exclusive rights in the Chicago Area Market to the NYTNS, NYTGS, and such features as the Paul Greenberg, Mike Downey, and "Dear Abby" columns, "Peanuts," "Doonesbury," "Cathy," "Blondie," "Calvin & Hobbes," "Hagar the Horrible," and "B.C.". In addition, through Tribune Media, the *Tribune* has acquired exclusive rights in the Chicago Area Market to such popular features as the Dave Barry column.

36. The *Sun-Times* has entered into contracts with LAT-WPNS, Creators, King, United, and Universal whereby it has acquired exclusive rights in the Chicago Area Market to LAT-WPNS and such popular features as "Garfield" and "Wizard of Id."

37. The *Daily Herald* has sought to subscribe to, among others, the NYTNS, NYTGS, the LAT-WPNS, Paul Greenberg, Dave Barry, "Peanuts," "Doonesbury," "Cathy," "Blondie," "Calvin & Hobbes," "Hagar the Horrible," "B.C.," "Garfield," and "Wizard of Id," but it has been denied access to these supplemental news services and features by the defendants controlling them because of the exclusive contracts they have entered into with the *Tribune* and the *Sun-Times* and by the refusal of the *Tribune* and the *Sun-Times* to waive the exclusivity of their licenses.

38. The only supplemental news services and features available to the *Daily Herald* are those that are available to all newspapers on a non-exclusive basis or are not popular enough to interest the *Tribune* or the *Sun-*

Times. Only a small number of the popular syndicated features are available on a non-exclusive basis, and none of the supplemental news services available on a non-exclusive basis is a reasonably effective substitute for the NYTNS or the LAT-WPNS.

39. The *Tribune* and the *Sun-Times* in addition have obtained from the defendant supplemental news services exclusive rights to a substantial amount of newsworthy information that the *Tribune* and the *Sun-Times* do not publish. As a result, such information is unavailable to most readers of general interest newspapers in the Chicago Area Market. Therefore, such exclusive licenses not only restrain trade, but also prevent the flow of significant opinion and analysis of newsworthy events to residents of the Chicago Area Market.

40. The exclusive licenses obtained by the *Tribune* and the *Sun-Times* from the other defendants have adversely affected consumers, advertisers, and competition in the Chicago Area Market by:

(a) creating unnatural barriers to entry into the Chicago Area Market by denying the *Daily Herald* and other potential competitors access to supplemental news services and features necessary for a full and effective entry into that market and the ability to compete with the *Tribune* and the *Sun-Times*;

(b) lessening the supply of news, opinions, and features available to readers in the Chicago Area Market;

(c) preventing competition among the *Daily Herald*, the *Tribune* and the *Sun-Times* that would exist but for readers' desire to obtain news reports and features in their newspaper that are not available to the

Daily Herald due to the defendants' exclusive agreements;

(d) depriving readers of the *Daily Herald* who do not wish to buy more than one general interest newspaper access to popular features which they could obtain through the *Daily Herald* but for the exclusive agreements; and

(e) preventing further competition for advertisers in the Chicago Area Market that would exist if the *Daily Herald* were unhindered by the exclusive agreements.

Count I - Section 7 of the Clayton Act

41. Paddock Publications realleges paragraphs 1-40 alleged above.

42. The *Tribune* and the *Sun-Times*, being engaged in interstate commerce, have through the exclusive licenses described herein acquired assets of defendants New York Times Syndication Sales Corp., LAT-WPNS, Creators, King, LAT Syndicate, United, and Universal, all corporations engaged in interstate commerce, and the effect of these acquisitions has been to lessen competition substantially and to tend to create a monopoly in the sale of general interest newspapers in the Chicago Area Market.

43. As a result of the forgoing violations and resulting accumulation of exclusive rights by the *Tribune* and the *Sun-Times*, the *Daily Herald* has been restrained in its ability to compete in the sale of general interest newspapers in the Chicago Area Market and from extending the area in which the *Daily Herald* is circulated, and Paddock Publications has lost sales and profits which it

would have earned if competition in that market were not foreclosed by the anticompetitive acquisition of exclusive rights described above. Without injunctive relief preventing further and continuing violations by the *Tribune* and the *Sun-Times* of the Clayton Act and requiring divestiture of the assets illegally acquired, newspaper consumers, advertisers, and Paddock Publications will suffer further antitrust injury.

Count II - Section 1 of the Sherman Act

44. Paddock Publications realleges paragraphs 1-40 alleged above.

45. The *Tribune* and the *Sun-Times* each possesses market power in the sale of general interest newspapers in the Chicago Area Market.

46. The agreements described above entered into between the *Tribune* and the New York Times Syndication Sales Corp., Creators, King, LAT Syndicate, United, and Universal granting exclusive rights to the *Tribune*, and by the *Tribune* through Tribune Media to obtain exclusive rights, and the agreements described above entered into between the *Sun-Times* and LAT-WPNS, Creators, King, United and Universal granting exclusive rights to the *Sun-Times*, individually and collectively have substantially reduced competition in the sale of general interest newspapers in the Chicago Area Market and constitute unreasonable restraints of trade.

47. Paddock Publications and the public have suffered injury resulting from the reduction in competition caused by the illegal restraints of trade entered into by defendants. Paddock Publications, advertisers and newspaper

consumers in the Chicago Area Market will suffer further antitrust injury if the defendants' illegal conduct is not enjoined and the contracts entered into in unreasonable restraint of trade are not invalidated.

Prayer for Relief

WHEREFORE, plaintiff Paddock Publications demands judgment in its favor and prays that:

A. The Court decree that the foregoing acquisitions by the *Tribune* and the *Sun-Times* of exclusive rights to, among others, NYTNS, NYTGS, LAT-WPNS, the Paul Greenberg, Mike Downey, Dave Barry, and "Dear Abby" columns, and the "Peanuts," "Doonesbury," "Cathy," "Blondie," "Calvin & Hobbes," "Hagar the Horrible," "B.C.," "Garfield," "Wizard of Id" and "Crock" comics, and the accumulation of these acquisitions and other acquisitions of exclusive rights, are illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18;

B. The Court decree that the exclusive contracts for supplemental news services and syndicated features entered into between the *Tribune* and the New York Times Syndication Sales Corp., Creators, King, LAT Syndicate, United, and Universal and by the *Tribune* through Tribune Media, and the exclusive contracts for supplemental news services and syndicated features entered into between the *Sun-Times* and LAT-WPNS, Creators, King, United and Universal individually and in combination constitute unreasonable restraints of trade illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;

C. The Court declare that the exclusive contracts in question are void and unenforceable as against public policy as expressed in the federal antitrust laws;

D. The Court order divestiture of each of the exclusive rights illegally acquired by the *Tribune* and the *Sun-Times*;

E. The Defendants be enjoined from further violations of the antitrust laws;

F. Paddock Publications be awarded its costs, including reasonable attorney's fees; and

G. Paddock Publications be awarded such other and further relief as this Court deems just and proper.

DATED: December 13, 1993

PADDOCK PUBLICATIONS, INC.

By s/ James T. Malysiak
One of Its Attorneys

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[Dated November 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	
Plaintiff,	)	
v.	)	Civil Action No. 93 C 7493
CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC. NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/ WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC. TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,	)	Judge David H. Coar Magistrate Judge Ronald A. Guzman
Defendants.	)	

AMENDED COMPLAINT

Nature of the Case

1. Plaintiff Paddock Publications, Inc. ("Paddock Publications"), the publisher of the *Daily Herald*, a daily general interest newspaper, brings this civil action against the defendants named herein for injunctive relief to prevent continuing injury to Paddock Publications and the public from defendants' violations of Section 1 of the

Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. The defendants include Chicago Tribune Company and Chicago Sun-Times, Inc., the publishers of the daily general interest newspapers with the largest circulations in the Chicago metropolitan area; the New York Times Syndication Sales Corporation and the Los Angeles Times/Washington Post News Service, Inc., which supply the two leading supplemental news services; and the leading syndicators of newspaper features. Supplemental news services provide newspapers throughout the country with in-depth news coverage and analysis not available from any other source, such as the Associated Press wire service. Features syndicators similarly provide newspapers with features such as political commentary columns, advice columns, political cartoons, and comics. The defendant supplemental news services and newspaper features syndicators have entered into exclusive license agreements with Chicago Tribune Company and Chicago Sun-Times, Inc. that prevent the *Daily Herald* from publishing material from the two leading supplemental news services and the most popular newspaper features. There are no adequate substitutes available to the *Daily Herald*. As a result, competition between the *Daily Herald* and the dominant general interest newspapers in the Chicago area, the *Chicago Tribune* and the *Chicago Sun-Times,* has been and continues to be unlawfully restrained and suppressed.

Jurisdiction and Venue

3. This action is filed under Section 16 of the Clayton Act, 15 U.S.C. § 26, for injunctive relief against threat-

ened loss and damage by violations of the antitrust laws. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337.

4. Each of the defendants named in this Amended Complaint maintains an office, transacts business or is found within the Northern District of Illinois, and each of the defendants is within the jurisdiction of this Court for the purpose of service of process. The interstate trade and commerce described herein is carried on, in part, within the Northern District of Illinois. Defendants have committed and continue to perform unlawful acts within the Northern District of Illinois that restrain trade and substantially lessen competition and have a harmful effect on consumers.

5. This action may be brought in this District pursuant to 15 U.S.C. §§ 4, 22, and 26 and 28 U.S.C. § 1391 because the defendants are found or transact business or are doing business in this District and/or the claim arose in this District.

Plaintiff

6. Paddock Publications is a Delaware corporation with its principal place of business at 217 West Campbell Street, Arlington Heights, Illinois 60006. Paddock Publications owns and publishes the *Daily Herald*, a general interest newspaper with both daily and Sunday editions (the "*Daily Herald*"), which Paddock sells and distributes in the Chicago metropolitan area. Paddock Publications purchases a substantial volume of supplies and services in interstate commerce.

Defendants

7. Defendant Chicago Tribune Company (the "*Tribune*") is an Illinois corporation engaged in interstate commerce with its principal place of business at 435 North Michigan Avenue, Chicago, Illinois 60611. The *Tribune* owns and publishes the *Chicago Tribune*, a general interest newspaper with both daily and Sunday editions, which is sold and distributed throughout the Chicago metropolitan area. The *Tribune* purchases a substantial amount of materials, supplies and services in interstate commerce including supplemental news services and syndicated features. The *Tribune* also sells a substantial volume of newspapers and services in interstate commerce.

8. Defendant Chicago Sun-Times, Inc. (the "*Sun-Times*") is a Delaware corporation engaged in interstate commerce with its principal place of business at 401 North Wabash Avenue, Chicago, Illinois 60611. The *Sun-Times* owns and publishes the *Chicago Sun-Times*, a general interest newspaper with both daily and Sunday editions, which the *Sun-Times* sells and distributes throughout the Chicago metropolitan area. The *Sun-Times* purchases a substantial volume of supplies and services in interstate commerce and sells a substantial volume of newspapers and services in interstate commerce.

9. Defendant New York Times Syndication Sales Corporation ("N.Y. Times Syndication Sales") is a Delaware corporation with its principal place of business at 130 Fifth Avenue, New York, New York 10011. N.Y. Times Syndication Sales sells in interstate commerce the New York Times News Service ("NYTNS"), a supplemental

news service, and the New York Times Graphics Service ("NYTGS") to newspaper companies throughout the country including the *Tribune*. Subscribers to NYTNS and NYTGS obtain news reports and commentary published in the *New York Times* and other major newspapers as well as other syndicated features.

10. Defendant Los Angeles Times/Washington Post News Service, Inc. ("LAT-WPNS") is a corporation organized under the laws of the District of Columbia with its principal place of business at 1150 15th Street, N.W., Washington, D.C. 20071. LAT-WPNS sells its supplemental news service in interstate commerce to newspaper companies throughout the country, including the *Sun-Times*. Subscribers to LAT-WPNS obtain news reports and commentary published in the *Los Angeles Times* and *Washington Post* as well as other syndicated features and news services.

11. Tribune Media Services, Inc. ("Tribune Media") is a Delaware corporation with its principal place of business at 435 North Michigan Avenue, Chicago, Illinois 60611. Tribune Media sells syndicated features, such as the Dave Barry column, in interstate commerce to newspaper companies, including the *Tribune*.

12. Defendant Creators Syndicate ("Creators") is a Delaware corporation with its principal place of business at 5777 West Century Blvd., Los Angeles, California 90045. Creators sells syndicated features, including the "B.C." and "Wizard of Id" comics, in interstate commerce to newspaper companies, including the *Tribune* and the *Sun-Times*.

13. Defendant King Features Syndicate ("King") is a New York corporation with its principal place of business

at 216 East 45th Street, New York, New York 10017. King sells syndicated features, including the "Blondie" and "Hagar the Horrible" comics, in interstate commerce to newspaper companies throughout the country including the *Tribune* and the *Sun-Times*.

14. Defendant Times Mirror Company d/b/a Los Angeles Times Syndicate ("LAT Syndicate") is a Delaware corporation with its principal place of business at Times Mirror Square, Los Angeles, California 90053. LAT Syndicate sells syndicated features in interstate commerce to newspaper companies throughout the country, including the *Tribune*.

15. Defendant United Media ("United") is a Delaware corporation with its principal place of business at 200 Park Avenue, New York, New York 10166. United sells syndicated features, including the "Peanuts" comic, in interstate commerce to newspaper companies throughout the country including the *Tribune* and the *Sun-Times*.

16. Defendants Universal Press Syndicate ("Universal") is a Delaware corporation with its principal place of business at 4900 Main Street, Kansas City, Missouri 64112. Universal sells syndicated features, including the "Dear Abby" advice column and the "Doonesbury," "Cathy," "Garfield," and "Calvin & Hobbes" comics, in interstate commerce to newspaper companies throughout the country including the *Tribune* and the *Sun-Times*.

Nature of Trade and Commerce

Nature of the Market for General Interest Newspapers

17. General interest newspapers provide their readers with international, national, regional and local news reports and analysis, national and local sports reports and commentary, weather reports, and syndicated features including columns that provide commentary, advice or opinions on a variety of subjects, comic strips, political cartoons, and puzzles. General interest newspapers are designed to appeal to a broad spectrum of readers with differing interests and needs for information. Because of transportation costs, the need to deliver news on a rapid basis, the need to attract local advertisers, and the need to cover regional and local news and sports, the business of creating and selling general interest newspapers in the United States is inherently local in nature. As a result, general interest newspapers designed for readers living and working in one metropolitan area are not adequate substitutes for newspapers designed for readers living and working in another metropolitan area.

18. To compete with other general interest newspapers in the same market, a newspaper must be able to report extensively on international, national, regional and local affairs; cover national, regional and local sports events; and provide its readers with a number of the most popular columns, political cartoons, comics, and other features.

19. Natural barriers to entry into any given geographical market for general interest newspapers are very high. To enter into such a market and compete effectively, it is necessary at a minimum to develop re-

porting and editing staffs for regional and local news and sports, obtain access to high-quality international and national news reporting and popular syndicated features, acquire production facilities and presses, develop a distribution system capable of delivering papers on a timely basis, and continuously solicit subscribers and advertisers. To enter the market and compete effectively, it is also necessary to overcome readers' loyalty to their current general interest newspaper because most readers of general interest newspapers purchase only one such newspaper each day.

20. The sale of general interest newspapers in the Chicago metropolitan area including Cook, Lake, DuPage, Kane, McHenry, and Will Counties in Illinois and Lake and Porter Counties in Indiana (the "Chicago Area Market") constitutes a relevant market under the federal antitrust laws.

21. The *Tribune* and *Sun-Times* dominate the Chicago Area Market for general interest newspapers:

(a) With respect to all general interest newspapers published in the Chicago Area Market, the *Tribune* has a market share of approximately 42% and the *Sun-Times* approximately 30%. The *Daily Herald*, the strongest and most popular general interest newspaper competing with the *Tribune* and the *Sun-Times*, has a market share of approximately 7%.

(b) Alternatively, the relevant market consists solely of the *Tribune*, *Sun-Times*, and *Daily Herald* as the only general interest newspapers competing to be local consumers' primary daily newspaper. In that market, the *Tribune* has a market share of approximately 53%, the *Sun-Times* has a market share of approxi-

mately 38%, and the *Daily Herald* a market share of approximately 9%.

(c) In addition, since this case was filed, the owner of the *Sun-Times* has purchased and now operates the *Daily Southtown*, a general interest newspaper in the south and southwest sections of Chicago and the Chicago suburbs. The *Daily Southtown* was a competitor of the *Sun-Times* until it was acquired and lost its independence, thereby increasing the concentration and decreasing competition in the Chicago Area Market.

22. The *Tribune* and the *Sun-Times* each possesses market power in the sale of general interest newspapers in the Chicago Area Market.

23. The *Daily Herald*'s circulation is now concentrated in the northwest and west suburbs of Chicago, comprising parts of Cook, Lake, DuPage, McHenry, and Kane Counties. The *Daily Herald* plans to extend its circulation area throughout the entire Chicago suburban area, but the defendants' exclusive licenses challenged by this Amended Complaint significantly impede, restrain, and delay its ability to do so.

The Leading News Services

24. In order to publish a general interest newspaper and to augment the product of their own staffs, the *Tribune*, the *Sun-Times*, and the *Daily Herald* obtain supplemental news services and features that are distributed by syndicators.

25. The NYTNS and the LAT-WPNS provide news reporting and analysis of a scope and quality that cannot be obtained from other available news services. The

Tribune has an exclusive license to the NYTNS in the Chicago Area Market, and the *Sun-Times* has an exclusive license to the LAT-WPNS in the Chicago Area Market. These exclusive licenses enable the *Tribune* and the *Sun-Times* to prevent newspapers in substantial competition with them, such as the *Daily Herald*, from obtaining access to the news reporting and analysis provided by NYTNS and LAT-WPNS. Access to at least one of these two services is essential to enable the *Daily Herald* to provide the comprehensive and authoritative news reporting necessary to attract a large readership with diverse interests and to compete effectively with the *Tribune* and the *Sun-Times* in the sale of general interest newspapers in the Chicago Area Market. In addition, supplemental news services provided by other newspapers (such as Hearst Newspapers News Service, Cox News Service, and Gannett News Service) have become exclusively affiliated with the NYTNS or LAT-WPNS, and as a result of the *Tribune*'s exclusive license to the NYTNS and the *Sun-Times*' exclusive license to the LAT-WPNS, the *Daily Herald* is denied access to these other supplemental news services as well.

26. The *Tribune* publishes little of the copy made available to it by the NYTNS, and the *Sun-Times* publishes a small percentage of the copy made available to it by the LAT-WPNS. The material from those news services that is not published by the *Tribune* and the *Sun-Times*, respectively, is unavailable to most readers in the Chicago Area Market.

Syndicated Columns

27. Collectively, Tribune Media, Creators, LAT Syndicate and Universal control many of the most popular syndicated columns published in the United States. To attract a large readership with diverse interests and compete effectively in selling general interest newspapers, it is necessary to have access to the syndicated columns controlled by Tribune Media, Creators, LAT Syndicate and Universal.

28. The *Tribune* and the *Sun-Times* have exclusive licenses in the Chicago Area Market to the most popular syndicated columns controlled by Tribune Media, Creators, LAT Syndicate and Universal, which prevent newspapers in substantial competition with the *Tribune* and the *Sun-Times*, such as the *Daily Herald*, from publishing such columns. The unfairness in the Chicago Area Market of these exclusive licenses is demonstrated by the fact that the *Tribune*, which publishes the personal advice column by Ann Landers, whom defendant Creators, her syndicator, describes as "the most widely syndicated columnist in the world with 90 million daily readers," also has an exclusive license to the "Dear Abby" personal advice column by Abigail Van Buren, which defendant Universal characterizes as "the most widely syndicated column in the world" written by "America's premier advice columnist for more than 35 years." (Editor & Publisher, Syndicate Directory Section for 1993, pp. 97S, 115S (July 31, 1993).)

Syndicated Comics

29. Collectively, Tribune Media, Creators, King, United, and Universal control virtually all of the most

popular syndicated comics published in the United States. The *Sun-Times* and the *Tribune* have exclusive licenses in the Chicago Area Market to virtually all of the popular comics controlled by Tribune Media, Creators, King, United and Universal and a broad range of other comics. For instance, the *Tribune* and *Sun-Times* have exclusive licenses to the 12 most popular comics. These licenses prevent newspapers in substantial competition with the *Tribune* and the *Sun-Times*, such as the *Daily Herald*, from obtaining access to such comics. A newspaper such as the *Daily Herald* that is denied access to the most popular comics controlled by Tribune Media, Creators, King, United and Universal is at a severe disadvantage if it attempts to compete in any market for the sale of general interest newspapers with newspaper companies such as the *Tribune* and the *Sun-Times* that are able to publish such popular comics.

Effects of the Exclusive Licenses

30. Each of the *Tribune* and *Sun-Times* insists that its licenses to the leading supplemental news services and syndicated features must be on an exclusive basis so that its competitors are denied access to them. Each of the *Tribune* and *Sun-Times* is able to insist on exclusivity with respect to the leading supplemental news services and syndicated features because of their market power resulting from their dominant shares of the Chicago Area Market. As a result of the dominating market power of the *Tribune* and *Sun-Times*, when a new feature becomes available, the defendant syndicators offer the feature first to the *Tribune* on an exclusive basis. If the *Tribune* enters into the exclusive agreement

with the syndicator for the feature, the *Tribune* then has exclusive rights to that feature in the Chicago Area Market for as long as it wants them. If the *Tribune* declines the exclusive, the feature is offered to the *Sun-Times* on an exclusive basis. If the *Sun-Times* enters into the exclusive agreement with the syndicator for the feature, the *Sun-Times* then has exclusive rights to the feature in the Chicago Area Market for as long as it wants them. If the *Sun-Times* declines the exclusive, the feature is offered to the other newspapers in the Chicago Area Market on a non-exclusive basis. If at any time thereafter the *Tribune* or the *Sun-Times* wants the feature, the syndicator will grant it an exclusive license to the feature, except that any other newspaper that has already taken a license to the feature can retain it. However, if that other newspaper at any time terminates the license, the feature will not be relicensed to it as long as the *Tribune* or the *Sun-Times* has an exclusive license to that feature.

31. The exclusive licenses obtained by the *Tribune* and the *Sun-Times* over the supplemental news services, columns, political cartoons, and comics described above are automatically renewed, continue on a perpetual basis, and deny the *Daily Herald* the opportunity to obtain access to them. However, the *Daily Herald* is not granted exclusivity with respect to any feature it licenses from the defendant syndicators, and therefore any syndicated feature initially licensed to the *Daily Herald* is available to the *Tribune* or the *Sun-Times* merely upon their request. The effect of these exclusive licenses is to exclude the *Daily Herald* from the market for the leading supplemental news services and features. The inability of the *Daily Herald* to obtain the leading news services

and features has a devastating effect on its ability to compete with the *Tribune* and the *Sun-Times* for readers and also on its ability to extend its circulation to new areas with the Chicago Area Market.

32. The aggregate effect of the *Tribune's* exclusive licenses to supplemental news services and syndicated features severely restrains the *Daily Herald's* ability to compete in the Chicago Area Market and to extend its circulation to new areas within that Market. Moreover, the *Tribune's* exclusive license to the NYTNS in itself has a substantial anti-competitive effect on the *Daily Herald* and its ability to compete with the *Tribune*. As a result of that exclusive license, the *Daily Herald* cannot obtain the scope, quality, and volume of news material that is available to the *Tribune*. Access to the NYTNS would provide the *Daily Herald* with the international and national news coverage that it cannot now offer in competition with the *Tribune* and *Sun-Times*.

33. The aggregate effect of the *Sun-Times'* exclusive licenses to supplemental news services and syndicated features also severely restrains the *Daily Herald's* ability to compete in the Chicago Area Market and also to extend its circulation to new areas within that Market. Moreover, the *Sun-Times'* exclusive license to the LAT-WPNS in itself has a substantial anti-competitive effect on the *Daily Herald*. As a result of that exclusive license, the *Daily Herald* cannot obtain the scope, quality, and volume of news material that is available to the *Sun-Times*. Access to the LAT-WPNS would provide the *Daily Herald* with the international and national news coverage that it cannot now offer in competition with the *Tribune* and *Sun-Times*.

34. Competition should be encouraged among general interest newspapers serving the same market through the efforts of their own reporters, editors, columnists, cartoonists, and other employees and the quality and scope of their own work product. In its efforts to broaden the area of its competition with the *Tribune* and the *Sun-Times* and to attract readers away from them, the *Daily Herald* has improved those areas of its performance which it controls: for example, its reporting and editorial staffs, its sports and financial pages, and its production and distribution facilities. The one significant area which it cannot improve is the supplemental news services and syndicated features that it wishes to use; indeed, it is foreclosed from access to the materials it wants and needs. Consequently, the practice of exclusively licensing supplemental news services and features in the Chicago Area Market to the *Tribune* and the *Sun-Times* enables them to obtain a critical, but unfair and unlawful advantage over the *Daily Herald*. Exclusive licensing forecloses the *Daily Herald*'s access to supplemental news services and features which the *Tribune* and the *Sun-Times* had no role in creating and which they obtain merely by paying license fees.

35. Although the *Tribune* and the *Sun-Times* rigidly enforce the exclusivity of their licenses whenever the *Daily Herald* asks for a waiver, they have allowed daily newspapers that compete with the *Daily Herald* in Aurora, Elgin, Crystal Lake, and Waukegan, Illinois, to publish some of the supplemental news services and syndicated features in question. For instance, the *Sun-Times* has not prevented the *Northwest Herald*, a daily newspaper in Crystal Lake, Illinois, from using the LAT-WPNS, and the Aurora *Beacon-News* and the Waukegan

News-Sun use the NYTNS despite the *Tribune*'s exclusive license that prevents the *Daily Herald* from using it. As a result, the *Daily Herald* unfairly faces competition not only from the *Tribune* and the *Sun-Times*, but also from the suburban dailies that have access to at least some of the syndicated material that the *Daily Herald* seeks but has been denied.

No Justification for These Restraints of Trade

36. The defendants have no justification for the restraints of trade caused by these exclusive syndication licenses. The *Tribune* and the *Sun-Times* provide little if any promotion or other services in reliance upon exclusive publication rights to the news services or features in question. The success and popularity of the news services and features in question is well established, and thus the *Tribune* and the *Sun-Times* assume no risk in obtaining licenses to them. The license fees paid by the *Tribune* and the *Sun-Times* for these exclusive licenses are a small fraction of their production costs. Moreover, the *Tribune* and the *Sun-Times* have been publishing their newspapers in the Chicago Area Market for many years, and each sells several hundred thousand copies each day. Their ability to compete with one another and the *Daily Herald* does not depend upon having exclusive access to these news services and features. Invalidating these exclusive licenses would not affect the material that the *Tribune* and the *Sun-Times* publish. These exclusive licenses affect only the contents of the other newspapers in the market, most notably the *Daily Herald*, and that is their very purpose.

37. Any attempt to justify the exclusivity of the licenses in question by the so-called "20% rule" is invalid. In 1975 the United States District Court for the Southern District of New York approved the settlement between the United States Government and the Globe Newspaper Company (known as the "*Boston Globe* Consent Decree") of the Government's complaint that exclusive licenses to features violate the federal antitrust laws. United States v. Chicago Tribune-New York News Syndicate, Incorporated and Globe Newspaper Company, et al., 67 Civ. 4596, 4597, and 4598 (S.D.N.Y.). One of the terms of the settlement was that the *Globe* could not enforce any exclusive license to a syndicated feature in any county in which its morning and afternoon circulation together was less than 20% of the households in the county or its total daily circulation was less than 5,000 copies. The District Court stressed that "[t]he settlement reflected in this judgment establishes no nation-wide procrustean formula. . . . This formula is not intended as a yardstick by which syndicates may measure their contracts with other newspapers." (Opinion filed by Judge Edmund L. Palmieri, July 16, 1975, at p. 4.) The settlement also had no applicability whatever to supplemental news services. Yet the defendant supplemental news services, features syndicators, and newspapers have attempted to use the *Boston Globe* Consent Decree as an excuse for their anticompetitive exclusive licenses. Because the *Daily Herald* is located in Cook County, where the *Tribune* and the *Sun-Times* are also based, the defendants have used the so-called "20% rule" as a device to foreclose the *Daily Herald* from access to the leading supplemental news services and features. The LAT-WPNS, for instance, has expressly refused to license

the *Daily Herald* to use its material in Cook County unless the *Sun-Times* waives its exclusive, and the *Sun-Times* has refused to do so. This unlawful prohibition of use in Cook County as a practical matter prevents the *Daily Herald* from using the LAT-WPNS in any county in which it is circulated. Therefore, the *Boston Globe* Consent Decree, a settlement approved by the Court as a pro-competitive step in one market to reduce the extent of the exclusive licenses over syndicated features, with no intended impact on any other newspaper market, has been used perversely as a rationale for maintaining broad, anticompetitive exclusives in the Chicago Area Market.

38. The *Daily Herald* has asked each of the defendants to cease violating the federal antitrust laws and to allow it to use the NYTNS, the LAT-WPNS, and to publish the newspaper features now subject to exclusive licenses to the *Tribune* or *Sun-Times*. However, the defendants have not voluntarily ended their antitrust violations and continue to deny the *Daily Herald* the right to use the supplemental news services and to publish the features in question.

Violations Charged

39. The *Tribune* has entered into contracts with the N.Y. Times Syndication Corp., Creators, King, LAT Syndicate, United and Universal whereby it has acquired exclusive rights in the Chicago Area Market to the NYTNS, NYTGS, and such features as the "Dear Abby" column, "Peanuts," "Doonesbury," "Cathy," "Blondie," "Calvin & Hobbes," "Hagar the Horrible," and "B.C.". In addition, through Tribune Media, the *Tribune* has ac-

quired exclusive rights in the Chicago Area Market to such popular features as the Dave Barry column.

40. The *Sun-Times* has entered into contracts with LAT-WPNS, Creators, King, United, and Universal whereby it has acquired exclusive rights in the Chicago Area Market to LAT-WPNS and such popular features as "Garfield" and "Wizard of Id."

41. The *Daily Herald* has sought to subscribe to, among others, the NYTNS, NYTGS, the LAT-WPNS, Dave Barry, "Peanuts," "Doonesbury," "Cathy," "Blondie," "Calvin & Hobbes," "Hagar the Horrible," "B.C.," "Garfield," and "Wizard of Id," but it has been denied access to these supplemental news services and features by the defendants controlling them because of the exclusive contracts they have entered into with the *Tribune* and the *Sun-Times* and by the refusal of the *Tribune* and the *Sun-Times* to waive the exclusivity of their licenses.

42. The only supplemental news services and features available to the *Daily Herald* are those that are available to all newspapers on a non-exclusive basis or are not popular enough to interest the *Tribune* or the *Sun-Times*. Only a small number of the popular syndicated features are available on a non-exclusive basis, and none of the supplemental news services available on a non-exclusive basis is a reasonably effective substitute for the NYTNS or the LAT-WPNS.

43. The *Tribune* and the *Sun-Times* in addition have obtained from the defendant supplemental news services exclusive rights to a substantial amount of newsworthy information that the *Tribune* and the *Sun-Times* do not publish. As a result, such information is unavailable to most readers of general interest newspapers in the

Chicago Area Market. Therefore, such exclusive licenses not only restrain trade, but also prevent the flow of significant opinion and analysis of newsworthy events to residents of the Chicago Area Market.

44. The exclusive licenses obtained by the *Tribune* have, on an aggregate basis, suppressed competition and injured consumers in the Chicago Area Market by:

(a) creating unnatural barriers to entry into the Chicago Area Market by denying the *Daily Herald* and other potential competitors access to supplemental news services and features necessary for a full and effective entry into that market and the ability to compete with the *Tribune*;

(b) lessening the supply of news, opinions, and features available to readers in the Chicago Area Market;

(c) preventing competition between the *Daily Herald* and the *Tribune* that would exist but for readers' desire to obtain news reports and features in their newspaper that are not available to the *Daily Herald* due to the *Tribune's* exclusive agreements;

(d) depriving readers of the *Daily Herald* who do not wish to buy more than one general interest newspaper access to popular features which they could obtain through the *Daily Herald* but for the exclusive agreements; and

(e) preventing further competition for advertisers in the Chicago Area Market that would exist if the *Daily Herald* were unhindered by the exclusive agreements.

45. The *Tribune's* exclusive license to the NYTNS has in itself suppressed competition and injured consumers in the Chicago Area Market by denying the *Daily Herald* a vital source of high-quality international and national news reporting for which the *Daily Herald* has no available substitute.

46. The exclusive licenses obtained by the *Sun-Times* have, on an aggregate basis, suppressed competition and injured consumers in the Chicago Area Market by:

(a) creating unnatural barriers to entry into the Chicago Area Market by denying the *Daily Herald* and other potential competitors access to supplemental news services and features necessary for a full and effective entry into that market and the ability to compete with the *Sun-Times*;

(b) lessening the supply of news, opinions, and features available to readers in the Chicago Area Market;

(c) preventing competition between the *Daily Herald* and the *Sun-Times* that would exist but for readers' desire to obtain news reports and features in their newspaper that are not available to the *Daily Herald* due to the *Sun-Times'* exclusive agreements;

(d) depriving readers of the *Daily Herald* who do not wish to buy more than one general interest newspaper access to popular features which they could obtain through the *Daily Herald* but for the exclusive agreements; and

(e) preventing further competition for advertisers in the Chicago Area Market that would exist if the *Daily Herald* were unhindered by the exclusive agreements.

47. The *Sun-Times'* exclusive license to the LAT-WPNS has in itself suppressed competition and injured consumers in the Chicago Area Market by denying the *Daily Herald* a vital source of high-quality international and national news reporting for which the *Daily Herald* has no available substitute.

Count I

The *Chicago Tribune*'s Violations of Section 1 of the Sherman Act

48. Paddock Publications realleges paragraphs 1-47 alleged above.

49. The agreements described above entered into between the *Tribune* and the New York Times Syndication Sales Corp., Creators, King, LAT Syndicate, United, and Universal granting exclusive rights to the *Tribune*, and by the *Tribune* through Tribune Media to obtain exclusive rights, have, on an aggregate basis, suppressed competition in the sale of general interest newspapers in the Chicago Area Market, injured consumers, and constitute unreasonable restraints of trade. The *Tribune's* exclusive license to the NYTNS has itself had a substantial anti-competitive effect in the Chicago Area Market and therefore constitutes an unreasonable restraint of trade.

50. Paddock Publications and the public have suffered injury resulting from the suppression of competition caused by the illegal restraints of trade entered into by the *Tribune*. Paddock Publications, advertisers and

newspaper consumers in the Chicago Area Market will suffer further antitrust injury if the *Tribune's* illegal conduct is not enjoined and the contracts it has entered into in unreasonable restraint of trade are not invalidated.

51. N.Y. Times Syndication Corp., Creators, King, LAT Syndicate, United and Universal, by entering into contracts in restraint of trade with the *Tribune*, have also violated Section 1 of the Sherman Act.

Count II

The *Chicago Sun-Times'* Violations of Section 1 of the Sherman Act

52. Paddock Publications realleges paragraphs 1-47 alleged above.

53. The agreements described above entered into between the *Sun-Times* and LAT-WPNS, Creators, King, United and Universal granting exclusive rights to the *Sun-Times*, have, on an aggregate basis, suppressed competition in the sale of general interest newspapers in the Chicago Area Market, injured consumers, and constitute unreasonable restraints of trade. The *Sun-Times'* exclusive license to the LAT-WPNS has itself had a substantial anti-competitive effect in the Chicago Area Market and therefore constitutes an unreasonable restraint of trade.

54. Paddock Publications and the public have suffered injury resulting from the suppression of competition caused by the illegal restraints of trade entered into by the *Sun-Times*. Paddock Publications, advertisers and newspaper consumers in the Chicago Area Market will suffer further antitrust injury if the *Sun-Times'* illegal

conduct is not enjoined and the contracts it has entered into in unreasonable restraint of trade are not invalidated.

55. LAT-WPNS, Creators, King, United, and Universal, by entering into contracts in restraint of trade with the *Sun-Times*, have also violated Section 1 of the Sherman Act.

Count III

The *Chicago Tribune*'s Violations of Section 7 of the Clayton Act

56. Paddock Publications realleges paragraphs 1-47 alleged above.

57. The *Tribune*, being engaged in interstate commerce, has through the exclusive licenses described herein acquired assets of defendants New York Times Syndication Sales Corp., Creators, King, LAT Syndicate, United, and Universal, all corporations engaged in interstate commerce, and the effect of those acquisitions has been to lessen competition substantially and to tend to create a monopoly in the sale of general interest newspapers in the Chicago Area Market.

58. As a result of the forgoing violations and resulting accumulation of exclusive rights by the *Tribune*, the *Daily Herald* has been restrained in its ability to compete in the sale of general interest newspapers in the Chicago Area Market and from extending the area in which the *Daily Herald* is circulated, and Paddock Publications has lost sales and profits which it would have earned if competition in that market were not foreclosed by the anticompetitive acquisition of exclusive rights described above. Without injunctive relief preventing

further and continuing violations by the *Tribune* of the Clayton Act and requiring divestiture of the assets illegally acquired, newspaper consumers, advertisers, and Paddock Publications will suffer further antitrust injury.

59. N.Y. Times Syndication Corp., Creators, King, LAT Syndicate, United and Universal, by entering into the exclusive licenses with the *Tribune*, have also violated Section 7 of the Clayton Act.

Count IV

The *Chicago Sun-Times'* Violations of Section 7 of the Clayton Act

60. Paddock Publications realleges paragraphs 1-47 alleged above.

61. The *Sun-Times*, being engaged in interstate commerce, has through the exclusive licenses described herein acquired assets of defendants LAT-WPNS, Creators, King, LAT Syndicate, United, and Universal, all corporations engaged in interstate commerce, and the effect of those acquisitions has been to lessen competition substantially and to tend to create a monopoly in the sale of general interest newspapers in the Chicago Area Market.

62. As a result of the forgoing violations and resulting accumulation of exclusive rights by the *Sun-Times*, the *Daily Herald* has been restrained in its ability to compete in the sale of general interest newspapers in the Chicago Area Market and from extending the area in which the *Daily Herald* is circulated, and Paddock Publications has lost sales and profits which it would have earned if competition in that market were not foreclosed by the anticompetitive acquisition of exclusive rights

described above. Without injunctive relief preventing further and continuing violations by the *Sun-Times* of the Clayton Act and requiring divestiture of the assets illegally acquired, newspaper consumers, advertisers, and Paddock Publications will suffer further antitrust injury.

63. LAT-WPNS, Creators, King, United, and Universal, by entering into the exclusive licenses with the *Sun-Times*, have also violated Section 7 of the Clayton Act.

Prayer for Relief

WHEREFORE, plaintiff Paddock Publications demands judgment in its favor and prays that:

A. The Court decree that the exclusive contracts for supplemental news services and syndicated features entered into between the *Tribune* and the New York Times Syndication Sales Corp., Creators, King, LAT Syndicate, United, and Universal and by the *Tribune* through Tribune Media constitute unreasonable restraints of trade illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;

B. The Court decree that the exclusive contracts for supplemental news services and syndicated features entered into between the *Sun-Times* and LAT-WPNS, Creators, King, United and Universal constitute unreasonable restraints of trade illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;

C. The Court declare that all the exclusive contracts entered into by the *Tribune* and the New York Times Syndication Sales Corp., Creators, King, LAT Syndicate, United, and Universal and by the *Tribune* through Tribune Media, or in the alternative so many of them as

the Court determines necessary for effective competition, are void and unenforceable as against public policy as expressed in the federal antitrust laws;

D. The Court declare that all the exclusive contracts entered into by the *Sun-Times* and LAT-WPNS, Creators, King, United and Universal, or in the alternative so many of them as the Court determines necessary for effective competition, are void and unenforceable as against public policy as expressed in the federal antitrust laws;

E. The Court enter an injunction restraining the *Tribune*, as well as the other defendants that have entered into exclusive license agreements with the *Tribune*, from performing any contracts that violate the federal antitrust laws;

F. The Court enter an injunction restraining the *Sun-Times*, as well as the other defendants that have entered into exclusive license agreements with the *Sun-Times*, from performing any contracts that violate the federal antitrust laws;

G. The Court decree that all the foregoing acquisitions by the *Tribune* of exclusive rights to, among others, NYTNS, NYTGS, the Dave Barry and "Dear Abby" columns, and the "Peanuts," "Doonesbury," "Cathy," "Blondie," "Calvin & Hobbes," "Hagar the Horrible," "B.C.," and "Crock" comics are illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18;

H. The Court decree that all the foregoing acquisitions by the *Sun-Times* of exclusive rights to, among others, LAT-WPNS and the "Garfield" and "Wizard of Id" comics are illegal under Section 7 of the Clayton Act, 15 U.S.C. § 18;

I. The Court order divestiture of all of the exclusive rights illegally acquired by the *Tribune*, or in the alternative so many of them as the Court determines necessary for effective competition;

J. The Court order divestiture of all of the exclusive rights illegally acquired by the *Sun-Times*, or in the alternative so many of them as the Court determines necessary for effective competition;

K. Each of the defendants be enjoined from further violations of the antitrust laws in the Chicago Area Market;

L. Paddock Publications be awarded its costs, including reasonable attorney's fees; and

M. Paddock Publications be awarded such other and further relief as this Court deems just and proper.

DATED: November 13, 1995

PADDOCK PUBLICATIONS, INC.

By s/ James T. Malysiak
One of Its Attorneys

Lee A. Freeman, Jr.
James T. Malysiak
Albert F. Ettinger
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[Dated April 14, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	Civil Action No. 93 C 7493
Plaintiff,	)	
v.	)	Judge John A. Nordberg
CHICAGO TRIBUNE COMPANY, et al.,	)	Magistrate Ronald A. Guzman
Defendants.	)	

AFFIDAVIT OF DANIEL E. BAUMANN

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

DANIEL E. BAUMANN, on oath, deposes and states:

1. I am the President and Chief Operating Officer of Paddock Publications, Inc. ("Paddock"), the publisher of the *Daily Herald* newspaper. I have been employed by Paddock since 1964. I was Editor of the *Daily Herald* from 1975 to 1983 and Editor and General Manager from 1983 until 1987 when I assumed my current positions.

2. I am familiar with the history of both Paddock and the *Daily Herald*. The origins of the *Daily Herald* can be traced back to 1872 with the publication of the *Cook County Herald*, a weekly newspaper. The *Palatine Herald* began in 1873 as an edition of the *Cook County Herald*. H.C. Paddock, grandfather of the current own-

ers, bought the newspaper in 1898. The Arlington Heights edition of the *Cook County Herald* was initiated in 1926, followed in 1927 by the Mount Prospect edition and over the years by editions in neighboring suburbs. As weekly newspapers for most of their existence, the Paddock papers focused on reporting the local news of the northwest suburbs. In 1969, the *Herald* began publishing a daily edition Monday through Friday. A Saturday edition was added in 1975, and in 1978 its first Sunday edition was begun.

3. In 1987 we made the strategic decision to substantially expand the area in which the *Daily Herald* circulated in an effort to become the leading daily newspaper in suburban Chicago. The business plan we adopted was premised on developing the *Daily Herald* into a full-fledged alternative to the *Sun-Times* and *Tribune* for suburban readers. While it views the days's events through the eyes of a suburban audience and concentrates staff on gathering suburban news rather than city news, it also must provide all the essential elements readers expect to find in a daily newspaper. In pursuit of our plan, we enhanced the *Daily Herald*'s local news coverage by adding to its staff and increasing the number and size of its community news sections. The *Daily Herald* now publishes 19 separate local news sections daily, each tailored to a community or group of closely associated communities. We also substantially expanded the *Daily Herald*'s sports and business coverage and added many staff members to broaden the range of features throughout the newspaper. Our news staff of 205, nearly double industry "norms" for a paper our size, reflects the deep commitment we have made to providing the best local news coverage of any medium. At the same

time, our delivery service and time of delivery were improved, and we invested in high quality printing presses and high-capacity, modern four-color technology.

4. To compete effectively for new readers, however, it became apparent that the *Daily Herald* would have to obtain at least one of the nation's two major supplemental news services—the New York Times News Service ("NYT News Service") or the L.A. Times/Washington Post News Service ("LAT/WP News Service")—to be able to present national and international news coverage and analysis of a breadth and depth comparable to the *Tribune* and *Sun-Times*. Unlike the *Tribune* and *Sun-Times*, we do not have the resources to have our own Washington, D.C. news bureau nor correspondents in other key locations around the country and world. As a result, access to the leading news services is vital to smaller newspapers such as the *Daily Herald* that are trying to compete with established, well-financed papers. The NYT and LAT/WP News Services are in a unique category and by far the highest quality news services available. They provide the best-written and most in-depth news coverage and analysis, and they also provide substantially more material, and in greater breadth, than any other services. The only other news service that we believe is remotely close in quality is the Knight-Ridder/Tribune Information Services, which is owned jointly by the *Tribune* and the Knight-Ridder newspaper chain. We are not asking the *Tribune* or *Sun-Times* to license us to use news service material that they themselves developed. None of the other news services is an adequate substitute that would enable the *Daily Herald* to compete with the *Tribune* and *Sun-Times*.

5. In addition, we knew that it would be very difficult to compete effectively for readers with the *Tribune* and *Sun-Times* unless the *Daily Herald* could present the highly popular features such as comics, advice columns and political cartoons that the *Tribune* and *Sun-Times* purchase from syndicators. The quality of news services and features available to a newspaper is critical because of changing trends in newspaper readership. These trends are unmistakable, and newspapers can ignore them only at grave risk: Each year, fewer readers are willing to purchase two daily newspapers; instead, they select that paper which fills the widest range of their needs. Although there are numerous features available, only a small number actually is of high enough quality to attract a broad range of readers. Between them, the *Tribune* and *Sun-Times* have exclusive licenses to virtually all of the high-quality, popular features, including the 12 most popular comics and the "Dear Abby" advice column.

6. Since our decision in 1987 to expand broadly into communities to the south, however, we have failed to obtain licenses to use the leading news services and features. The NYT News Service and the LAT/WP News Service refused to license us because of exclusive licenses that they had granted to the *Tribune* and *Sun-Times*, respectively. The leading features syndicators also refused to license us to use the most popular comics, advice columns and political cartoons on the ground that their licenses with the *Tribune* and *Sun-Times* are exclusive. The features that are available to us are not of the quality or the popularity to compete for readers with features available in the *Tribune* and *Sun-Times*.

7. Because we have been blocked from access to the leading news services, comics, advice columns and political cartoons by the *Tribune* and *Sun-Times*' exclusive licenses, our efforts to expand the *Daily Herald*'s circulation to the south into key communities such as Naperville, Wheaton, Glen Ellyn, and Lombard have not won significant numbers of readers from the *Tribune*, which traditionally enjoyed market dominance in DuPage County. Our reader surveys demonstrate that our limited success in attracting *Tribune* readers there stems from our inability to obtain both the popular features that the *Tribune* and *Sun-Times* enjoy and a top-notch supplemental news service that would give the *Daily Herald* a fully competitive report of national and international events. Reader surveys demonstrate that, while the *Daily Herald* is recognized as the preeminent source of local news, a perception exists among many newspaper readers that it is an incomplete source of news because of the superior national/international news services and features available to the *Tribune* and *Sun-Times*. We have postponed any further major expansion in that area until these problems can be remedied.

8. I have read the defendants' motion to dismiss or alternatively for summary judgment and the supporting brief and declarations. I disagree with the defendants' contention that the declines in their circulation levels since 1987 are largely attributable to competition from the *Daily Herald*. Reports from the Audit Bureau of Circulations ("ABC") demonstrate that the lost circulation of the two metros has been in the City of Chicago, where the *Daily Herald* is not a competitive factor. Exhibit 1, attached, charts ABC-documented circulation changes for both metros since 1987. These data show

both metropolitan papers lost approximately 20 percent of their City of Chicago circulation since 1987. In the suburbs, however, the *Tribune* showed a modest gain during that period while the *Sun-Times* showed only a slight decline. The *Daily Herald* does not attempt to cover the City of Chicago and in fact sells only about 435 copies in the City of Chicago, primarily as a convenience to advertising agencies, public officials and others who wish to see our newspaper. Although we take little credit for our competitors' circulation declines, in my judgment if we were not restricted by their exclusive licenses from obtaining the leading news services and features we would be able to win large numbers of suburban readers away from both the *Tribune* and *Sun-Times* because our superior local news coverage would be part of a complete daily news report.

Further affiant sayeth not.

s/ Daniel E. Baumann
Daniel E. Baumann

SUBSCRIBED AND SWORN TO
before me on April 14, 1994.

s/ Darlene J. Stoesser
Notary Public

My commission expires on 2/28/98.

Exhibit 1

Chicago Tribune (Daily)	1987	1988	1989	1990	1991	1992	1993	Difference 87 - '93
City Zone	239,581	238,440	217,661	208,377	203,621	195,234	189,258	-21.00%
Balance of Market (Suburban)	418,885	435,262	416,058	431,960	436,218	441,637	433,211	3.42%
Change Year to Year:								
City Zone		-0.48%	-8.71%	-4.27%	-2.28%	-4.12%	-3.06%	
Change Year to Year:								
Suburban		3.91%	-4.41%	3.82%	0.99%	1.24%	-1.91%	
Chicago Sun-Times (Daily)	1987	1988	1989	1990	1991	1992	1993	Difference 87 - '93
City Zone	342,553	339,824	303,572	281,756	280,197	276,570	275,087	-19.70%
Balance of Market (Suburban)	257,545	261,377	249,483	241,295	241,680	244,483	253,853	-1.43%
Change Year to Year:								
City Zone		-0.80%	-10.67%	-7.19%	-0.55%	-1.29%	-0.54%	
Change Year to Year:								
Suburban		1.49%	-4.55%	-3.28%	0.16%	1.16%	3.83%	
Source: 1987 - 1993 ABC Audit Reports - Paragraph 1B								

Chart 1

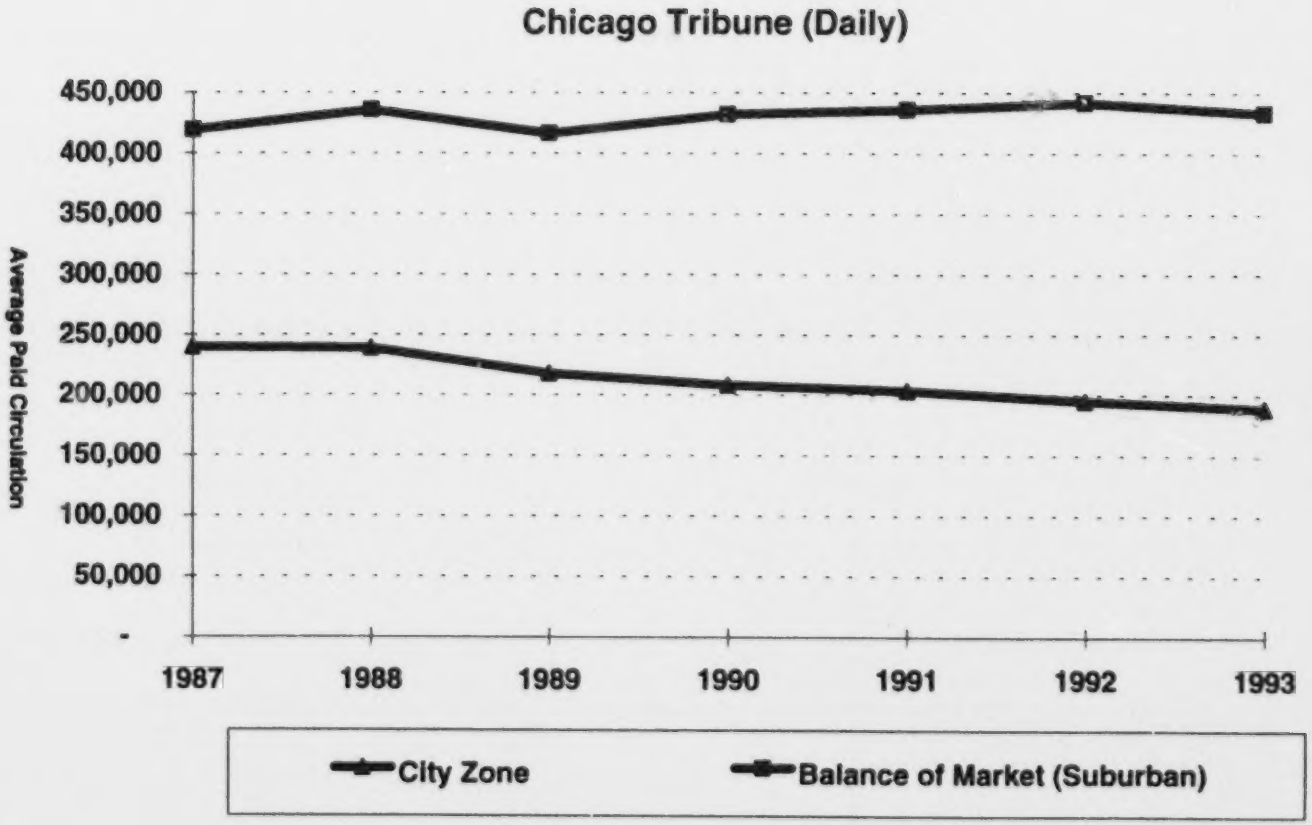
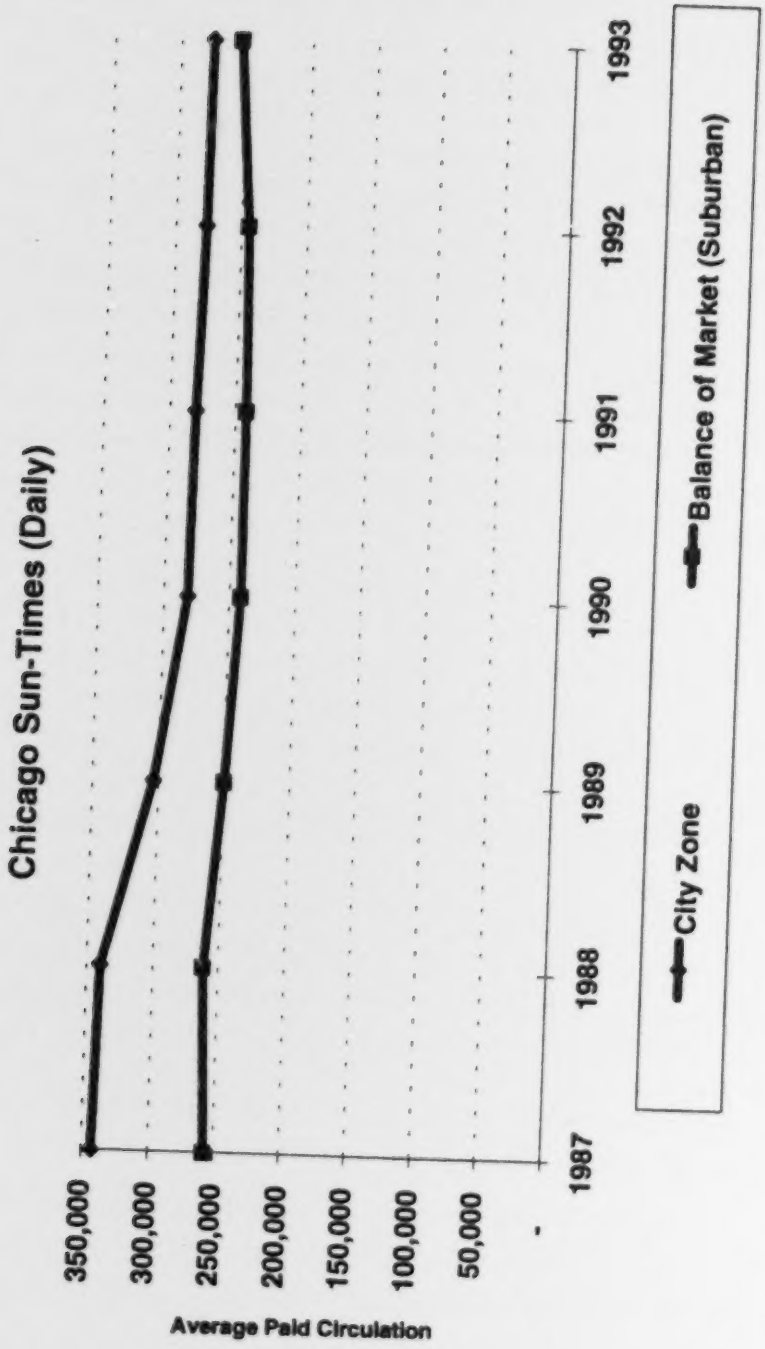

Chicago Tribune (Daily)
Average Paid Circulation
450,000
400,000
350,000
300,000
250,000
200,000
150,000
100,000
50,000
-
1987
1988
1989
1990
1991
1992
1993
City Zone
Balance of Market (Suburban)

Chart 2


Chicago Sun-Times (Daily)
350,000
300,000
250,000
200,000
150,000
100,000
50,000
-
Average Paid Circulation
1987
1988
1989
1990
1991
1992
1993
City Zone
Balance of Market (Suburban)

[Dated April 15, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	Civil Action No. 93 C 7493
Plaintiff,	)	
v.	)	Judge John A. Nordberg
CHICAGO TRIBUNE COMPANY, et al.,	)	Magistrate Ronald A. Guzman
Defendants.	)	

AFFIDAVIT OF THOMAS E. JACKSON

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

THOMAS E. JACKSON, on oath, deposes and states that:

1. I am Publisher of the *Daily Southtown*, a newspaper owned and operated by Pulitzer Community Newspapers, Inc., that is circulated in southern Cook County and northern Will County. Pulitzer Community Newspapers, Inc. is a wholly-owned subsidiary of Pulitzer Newspapers, Inc., which has its headquarters in St. Louis, Missouri.

2. The main competitors of the *Daily Southtown* are the *Chicago Tribune* and the *Chicago Sun-Times*. In our efforts to compete with the *Tribune* and *Sun-Times*, we

have attempted to obtain licenses to use the leading news services—the New York Times News Service and the Los Angeles Times/Washington Post News Service—as well as the leading and most popular features such as comic strips, advice columns, and political commentary columns. We have been foreclosed from obtaining such news services and features by exclusive licenses that the *Tribune* and *Sun-Times* have with those news services and leading features syndicators. The leading features syndicators are Universal Press Syndicate, United Features, King Features, Creators Syndicate, Los Angeles Times Syndicate, and Tribune Media Services. The *Tribune* and *Sun-Times* have exclusive licenses to packages of features, and we are precluded as a result from using some features that the *Tribune* and *Sun-Times* do not even use.

3. Without access to the highest quality news services and most popular features, the *Daily Southtown* is at a great competitive disadvantage with the *Tribune* and *Sun-Times*. The news services and features that are available are not adequate substitutes. Usually they are available only because the *Tribune* and *Sun-Times* do not want them.

4. The *Tribune* and *Sun-Times*' exclusive licenses deprive our readers of material that we would like to provide them, and they also deprive prospective readers of a full choice between competing newspapers.

5. I do know that suburban newspapers in St. Louis share syndicated material with the daily newspaper, the *St. Louis Post-Dispatch*.

Further affiant sayeth not.

s/Thomas E. Jackson
Thomas E. Jackson

SUBSCRIBED AND SWORN TO
before me on April 15, 1994.

s/Charles Vasile, Jr.
Notary Public

My commission expires on 4/24/94 .

[Dated April 14, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	Civil Action No. 93 C 7493
Plaintiff,	)	
v.	)	Judge John A. Nordberg
CHICAGO TRIBUNE COMPANY, et al.,	)	Magistrate Ronald A. Guzman
Defendants.	)	

AFFIDAVIT OF DOUGLAS K. RAY

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

DOUGLAS K. RAY, on oath, deposes and states:

1. I am Vice President and Editor of Paddock Publications, Inc. ("Paddock"), the publisher of the *Daily Herald*. I have been in my current position since 1987. From 1983 until 1987 I was Executive Editor. My responsibilities include overseeing contracts with supplemental news services and features syndicators to provide material for the *Daily Herald*.

2. When we decided in 1987 to expand the *Daily Herald*'s circulation beyond its traditional area in the northwest suburbs, we knew that we had to obtain access to at least one of the leading supplemental news services and popular features, particularly comics and an

advice column, to be able to compete effectively for readers with the *Tribune* and the *Sun-Times* (although the bulk of the *Sun-Times'* circulation is in Chicago and bordering suburbs). The *Tribune* and the *Sun-Times*—especially the *Tribune*—have the great advantage of using the leading news services to supplement the output of their own news bureaus in other cities in the United States and around the world. Our strength is in the quality of our coverage of suburban news, but we do not have the financial resources for our own news bureaus providing national and international coverage. We have to improve our national and international news reporting to be able to pose a serious challenge to the *Tribune* and *Sun-Times*.

3. The only news services that would enable us to compete with the *Tribune* and *Sun-Times* are the New York Times News Service ("NYT News Service") and the Los Angeles Times/Washington Post News Service ("LAT/WP News Service"). These two news services are far superior to all others in the quality, breadth, and depth of their national and international coverage and overall package of news and features. Indeed, a recent trend has seen formerly independent news services such as Newhouse, Hearst, and the Baltimore Sun become part of the two leading news services. We have purchased the Christian Science Monitor and Reuters, but they, along with any other available supplementals, are insufficient to upgrade our national and international coverage to a level that would enable us to compete effectively with the *Tribune* and *Sun-Times*. Associated Press is an important source of basic news reports, but it does not provide the scope or depth of coverage or analysis that the NYT News Service or LAT/WP News Service provide.

4. Our efforts to obtain the NYT News Service and the LAT/WP News Service, however, have failed. The NYT News Service has refused to license the *Daily Herald* on the ground that the *Tribune* has an exclusive license in the Chicago area, and the LAT/WP News Service has declined to license the *Daily Herald* on the ground that the *Sun-Times* has an exclusive in Cook County which it refuses to waive. The LAT/WP News Service has informed us that we might be able to be licensed for publications limited to other Chicago area counties, but our base of operations is in suburban Cook County and it is not feasible for us to publish an entirely different newspaper in other counties.

5. Our efforts to obtain the most popular features have also failed because of exclusive licenses held by the *Tribune* and *Sun-Times*. I have asked the leading features syndicators to license the *Daily Herald* to publish the most popular comic strips, the "Dear Abby" advice column, and other columnists' work. I have been able to obtain leading features only if the *Sun-Times* and *Tribune* have canceled them or passed on them. I continually find myself in a position in which our competitors can control my editorial decisions as to which features and news services I can use and when I can use them even though those competitors have simply purchased the features and news services "off the shelf." However, if the *Tribune* and *Sun-Times* decline to take a feature but I do take it and it becomes popular, the syndicators will still grant the *Tribune* or *Sun-Times* a non-exclusive license. Exclusivity is a one-way street.

6. Paddock has invested considerable money and effort to develop the *Daily Herald* into a distinctive alternative to the *Tribune* and *Sun-Times* with its own format

and style. I have read the defendants' contentions that if we were able to obtain the news services and features that they now publish exclusively, we would "mimic" the *Tribune* and *Sun-Times*. That analysis is inaccurate. With respect to news service material, I do not see how mimicry is even possible. If we obtained the NYT News Service, for example, we would receive copy simultaneously with the *Tribune*. Each paper would have to make a decision on what items from the many available it will use in its next edition or subsequent editions. Chances are we would use some material that the *Tribune* passed over, and the *Tribune* would use some material that we would omit. In fact, it is my belief that the *Daily Herald* would use considerably more of the offerings than the *Tribune* because the *Tribune* tends, whenever possible, to use its own staff to cover national and international stories. The defendants are correct that there is so much material provided by the leading news services that most would not be used. While both papers might use the same material on important breaking stories, it is still likely that each paper would use the material differently in combination with other reports and with different emphasis. Over the years we have had access to some of the same sources as the *Tribune* and *Sun-Times*, such as the Associated Press and Reuters, and I have seen no indication that we have mimicked them in our use of the same available material or that they have mimicked us.

7. I also find completely insupportable the defendants' contention that we would mimic them in our use of features. We would make our selections on the basis of which features would attract and retain the most readers while still being consistent with our style and journal-

istic values. We would make our own judgment about where to place the comics and other features in our paper.

8. If there is any problem of mimicry in this case, it arises from the *Sun-Times*' and *Tribune*'s mimicking the *Daily Herald*. We have led the way in our innovative coverage of suburban news by developing 19 separate zoned editions. That means that each day our paper has 19 different versions of the local news section so that the reader will have available more news about his or her immediate area. The *Tribune* has copied our zoning approach. The *Tribune* has hired away two of my key editors handling our local news coverage: Gerould W. Kern, former *Daily Herald* executive editor, was hired by the *Tribune* as suburban editor. This was at the same time the *Tribune* began a concerted effort to increase zoning in the *Daily Herald*'s area. He took his knowledge of zoned coverage and local news and has guided the *Tribune*'s expanded effort in those areas. He now is metro editor of the *Tribune*. The *Tribune* then hired John Slania, formerly our city editor. He was placed in charge of the Schaumburg bureau and now competes directly with our editors for northwest suburban news. We are proud that we developed editorial talent meeting the *Tribune*'s high standards, but under these circumstances we do find complaints of mimicry untenable.

9. The defendants' contention that there are thousands of features available to the *Daily Herald* that are not subject to exclusives and that we should use some of them to promote diversity is a hollow assertion. If there are thousands of features available, these are features that readers do not want to read and newspapers do not want to publish. The system of exclusives does not pro-

mote diversity. To the contrary, it promotes stagnation by shielding the long-established, larger papers from the competition of smaller, innovative papers such as the *Daily Herald.*

10. The defendants' stress on promoting diversity is odd since both the *Tribune* and *Sun-Times* continue to publish features that we obtained first and therefore are not subject to exclusivity. To the best of my knowledge, the *Daily Herald* began using the "Frank and Ernest" comic strip and the Beverly Mills column before the *Sun-Times* and the "Dilbert" comic and the "Miss Manners" and "Trivia Test" features before the *Tribune*. The *Sun-Times* and *Tribune*, respectively, use the George Will and Jane Bryant Quinn columns even though they also appear in the *Daily Herald*. Given the *Tribune* and *Sun-Times*' current emphasis on avoiding mimicry and promoting diversity, I am surprised that they have not sought replacements from the thousands of other features that they claim are available. The reason that they have not is obvious: Contrary to the position they have taken in this case, there are very few high-quality features available.

11. On September 10, 1993, I wrote letters to the leading features syndicators, including defendant Universal Press Syndicate ("UPS"), asking for a voluntary termination of this system of exclusives. (The letter to UPS is included in the Appendix as Exhibit 74.) All the syndicators, except UPS, either ignored the letter or wrote back refusing to change the system of exclusives. However, Robert Duffy, Vice President and National Sales Director of UPS, called me to request a personal meeting about the matter when he was in Chicago. We met on October 22, 1993 at my office at the *Daily Herald*. Mr.

Duffy made several points during the meeting. First, he said that the *Tribune* insisted on exclusive licenses and UPS went along because it needed the exposure that the *Tribune*, with its large circulation and prestige, gave to its features so that other papers would also take those features. Mr. Duffy said that the *Tribune*'s contract with UPS was different from UPS' contracts with any other papers. It was not a standard contract and instead was written by the *Tribune*'s attorneys to provide an exclusive territory with a 50-mile radius around Chicago. Mr. Duffy said that the *Tribune* was more worried about the *Daily Herald* than the *Sun-Times* or other competitors in the Chicago area.

Further affiant sayeth not.

s/ Douglas K. Ray
Douglas K. Ray

SUBSCRIBED AND SWORN TO
before me on April 14, 1994.

s/ Darlene J. Stoesser
Notary Public

My commission expires on 2/28/98.

[Dated April 11, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	Civil Action No. 93 C 7493
Plaintiff,	)	
v.	)	Judge John A. Nordberg
CHICAGO TRIBUNE COMPANY, et al.,	)	Magistrate Ronald A. Guzman
Defendants.	)	

AFFIDAVIT OF DR. WILLIAM G. SHEPHERD

COMMONWEALTH OF MASSACHUSETTS)
) SS:
COUNTY OF HAMPSHIRE)

DR. WILLIAM G. SHEPHERD, on oath, deposes and states:

1. Qualifications.

1. My name is William G. Shepherd. I am Professor of Economics and Chair of the Department of Economics at the University of Massachusetts, in Amherst, Massachusetts.

2. My professional experience and research qualifications are summarized in the attached vita.

3. During 23 years at the University of Michigan and eight years at the University of Massachusetts, I have published 15 books and some 80 papers, mainly in the professional research journals, including extensive works

on antitrust issues of the sort posed in the present case. My textbooks include The Economics of Industrial Organization, 3d ed., Prentice-Hall, 1990, and Public Policies Toward Business, 8th ed., Richard D. Irwin, 1990.

4. I am the General Editor of the Review of Industrial Organization, a professional research and policy journal which also concentrates on competitive issues and antitrust policies. In 1967-68 I participated directly in antitrust policy, as the economic adviser to the head of the Antitrust Division in the U.S. Department of Justice.

5. I have also been involved as an expert economic witness in numerous antitrust and regulatory proceedings, evaluating the degree of competition and its effects. These proceedings have involved such industries as computer products, copiers, titanium dioxide, title insurance, copper recycling, railroads, airline computer reservation systems, electricity supply, long distance telephone service, and oil products pipelines. Most of them pose the main issue in this case: how to make competition effective when the market is dominated by one or two firms.

6. I have also testified before Congressional committees.

7. This affidavit is written before I have had access to full evidence about the facts of this case. My opinions may be revised as new evidence becomes available to me. But I am familiar with the main issues and patterns, and so I believe my opinions to be essentially correct and relevant.

8. In the affidavit, I first describe the anticompetitive nature of the exclusionary policies in this case. Next Part 3 presents the importance of effective competition, and

I describe the conditions that are required for competition to be genuinely effective.

9. In Part 4, I note the trend toward higher concentration in the newspaper industry and the resulting increase in market power. In Part 5, I affirm that the relevant market is for general-readership newspapers in the Chicago area. In Part 6, I explain why dominance by one or two firms is generally inconsistent with effective competition; and in particular, the two-newspaper dominance of this market prevents competition from being fully effective. Part 7 notes that the Daily Herald appears to be an efficient competitor. Part 8 explains why the adage that antitrust laws "protect competition, not competitors" has little relevance in this market.

10. In Part 9, I note that the exclusive policies may not actually maximize the value of the news and features properties. And though these exclusionary policies are common in this industry, Part 10 points out that they are still anticompetitive. It also gives examples of other markets where the removal of entrenched anticompetitive policies has increased competition.

2. The Playing Field Appears to be Markedly Tilted by the Exclusionary Policies; the Syndicated Services are Virtually "Bottlenecks."

11. The exclusionary policies at issue in this case are likely to intensify the monopoly power possessed by the two dominant newspapers because they give them distinct advantages. The news services and syndicated features that the defendants foreclose the Daily Herald from acquiring are the most desirable ones in the business. Though certain other news services are available,

they lack the widely-recognized quality and cachet of the NY Times and LA Times/Washington Post offerings.

12. Even when the Tribune and Sun-Times choose to use little of the exclusive news material, they are gaining advantages from excluding others from having the choice to use them. The advantages that the Tribune and Sun-Times derive from exclusive access to new material are especially unjustifiable because the Daily Herald and others are not allowed to choose among the best news and opinion sources. Accordingly the quality of the Daily Herald is reduced compared to the Tribune and Sun-Times. Moreover, all readers in the market who would prefer those items are also denied the chance to read them.

13. The Tribune and Sun-Times have also captured the best comics, advice columns and related items. For example, the Daily Herald currently is not able to consider using any of the 12 top-rated comics. Equally, the most popular advice columns, such as Dear Abby and Ann Landers, are also not available for the Daily Herald at any price.

14. Those limits restrict the Daily Herald's efforts to compete as a general-readership newspaper. The exclusion can bite sharply; readers apparently consider specific features to be important in deciding which newspaper to buy.

3. The Nature and Importance of Effective Competition.

15. Competition is essential to high-quality performance in a market system (see Scherer and Ross, 1991, Stigler, 1968, Shepherd, 1990). Some degree of competition exists

wherever two or more businesses contend for customers, but the degree of competition can range from virtual monopoly to fully effective competition.

16. Effective competition requires strong mutual pressure among the rivals in the market, so that each must strain to keep costs low, hold prices down to those costs, and innovate rapidly. Unless they attain excellent performance, firms simply do not survive under effective competition.

17. The resulting good performance is critically important to efficiency, growth and progress in the U.S. economy. When firms hold monopoly power, they tend to stagnate, become bureaucratic and fat, and lag in innovation. An economy with high degrees of market power is generally laggard and inefficient.

18. Extensive research into the whole range of real markets has established that there are two main conditions for competition to be fully effective:

19. First, there need to be numerous comparable rivals in the market, able to apply broad and intense pressure to each other by means of their low prices and rapid innovation. Just two or three firms will not suffice, because the larger one or two firms will tend to control the market and exclude the smaller rivals. The dominant firms may also tend to collude with each other, rather than engage in sharp price competition. Nor will competition be effective if there are one or two dominant firms surrounded by numerous minor competitors.

20. Second, there must be reasonably easy entry into the market. The ability of new rivals to enter and compete strongly will reinforce competition and prevent any collusion from lasting (Bain, 1956, 1968).

4. High and Rising Concentration in Newspaper Markets

21. There is extremely high concentration in the newspaper industry, compared to the array of normal markets in the economy. Few American cities have over two local newspapers (Bagdikian, 1987, Shepherd, 1990, pp. 416-23). The most common situation is just one newspaper, which holds a virtual monopoly over the local readers. Where there are two newspapers, typically one is markedly larger and stronger than the other. Altogether, newspapers comprise perhaps the most concentrated single major industry in the U.S. economy.

22. The trend toward higher concentration has been strong for decades and is still under way (Bagdikian, 1987). For example, in both Detroit and Little Rock, the two dominant papers have recently merged to form one virtual monopoly newspaper.

23. Newspaper chains add substantial reinforcement to the power of local monopolies. The chains provide financial and other advantages which virtually assure that no new entrant could succeed against the local monopoly paper.

24. Accordingly, there are severe limits on newspaper competition, compared to conditions in other countries and earlier in this country. Though high market power has become common in many hundreds of newspaper markets throughout the country, it is not benign. It can have marked effects on the usual economic outcomes, especially through a raising of prices and advertising rates, and a reduction of innovation. That is illustrated perhaps by the Tribune newspaper's ability maintain its lead over the Sun-Times despite holding its prices 42

percent above the Sun-Times' daily price and 20 percent above the Sun-Times' Sunday price (Tribune article, November 2, 1993). Note that this disparity persists despite the possible strength of competition between the Tribune and the Sun-Times.

25. There are also important impacts on the marketplace of information and ideas. Monopoly power restricts the range of news, viewpoints and choices available to the populace. There is a particular need to protect competition and enhance it where possible in this industry.

5. The Relevant Market is Chicago-area General-readership Newspapers.

26. A market is the zone within which consumers make choices among goods and services that are substitutable. Markets are customarily regarded as having two dimensions:

1. the type of product or service that is supplied and used by customers, sometimes called "the product market," and

2. the geographic extent of the market, sometimes called the geographic market."

27. Consider the "product market." The zone of consumer choice among product types is the general-readership citywide newspaper. Such newspapers offer a mix of global, national and Chicago news, plus commentary, sports, opinions and entertainment features. They are distinct from suburban newspapers and from weekly advertiser sheets, both of which are locally-focused. Consumers generally regard these specialized publications as

not a good substitute for the array of materials in the general-readership newspapers.

28. As in most actual markets, there is a degree of variety, rather than a perfect identity among the goods. The two leading newspapers, and the Daily Herald, all differ in some respects. They have different styles, viewpoints, and mixes of features. But they are all striving along the same dimensions.

29. General-readership newspapers have also long been regarded as distinct from other media. To most consumers, broadcasting offers quite different content, and it cannot be scanned or reread.

30. As for the geographic extent of the market, the market is clearly the whole Chicago area, because that is the location of the mass of readers. It is also the range within which the rival newspapers circulate. The exact borders of this area are not precisely determined, but that is usual in most markets, including newspaper markets. The edges of the market are often blurred, rather than marked by a universally-agreed bright line.

The whole market definition is therefore relatively obvious and noncontroversial.

31. Within this market, the market shares appear to be reasonably accurately measured on the basis of circulation, at 42 percent for the Tribune and 30 percent for the Sun-Times. The Daily Herald appears to have 7 percent, with the rest spread among various fringe papers.

32. An alternative basis is probably more valid. These three newspapers can be regarded as the only general-readership newspapers competing throughout the Chicago area. Therefore, they would comprise the entire market. On that basis, their market shares would be

larger: the Tribune at 53 percent, the Sun-Times at 38 percent, and the Daily Herald at 9 percent. The two dominant papers would then have a total of 91 percent of this market, while the Daily Herald is still a marginally significant competitor.

33. The two leaders' shares appear to be relatively stable. There has recently been no major downward shift of the leading firms' shares.

6. Dominance Prevents Effective Competition

34. Such a tight duopoly is usually better than pure monopoly, but it is not effective competition: neither in general nor in this market.

35. As has long been evident from the professional research literature, a dominance of two firms over the market prevents competition from being effective (Bain, 1968, Scherer and Ross, 1991). The technical term for that dual dominance is "duopoly." Such dominance commonly exerts control over the efforts of smaller firms to enter and compete, and it may apply tactics which exclude smaller competitors. If key resources can be controlled by the dominant firm or firms, the competitive playing field may be tilted.

36. There is a consensus among all of the major schools of economics that effective competition requires more than one or two firms. This consensus includes Chicago-School economists and legal scholars such as Robert Bork, Judge Richard Posner, Judge Frank Easterbrook, and Harold Demsetz.

37. The consensus is codified in the policies which the official U.S. antitrust agencies have followed since 1982.

Their guidelines for merger policies reflect the realities of market structure generally. In measuring concentration, they apply the HHI (the "Hirschman-Herfindahl index," which is the sum of the squares of the individual market shares. For instance, if there are five firms with 20 percent market shares each, the HHI is five times 20-squared, which = 5x(400), which = 2,000).

38. The official rule is that an HHI value in the range of 1,800 to 2,000 is at the threshhold value for significant market power. A duopoly will have a much higher HHI value; two 40-percent firms would have an HHI of two times 40-squared, which = 2x(1600), which = 3,200. The HHI validly indicates that two-firm dominance involves very high likelihoods that competition will be abridged by cooperation, for significant periods of time.

39. The index was developed for general use in all matters of concentration, including dominance, though the antitrust agencies have used the HHI most frequently in dealing with mergers.

40. Now consider the case at hand. First, concentration is very high in the Chicago general-readership newspaper market. The dual dominance by the Tribune and Sun-Times fits the research consensus in the field of Industrial Organization. Readers have few choices, even though the existence of the Daily Herald increases the choices from two to three.

41. The two duopolists have at least 72 percent of the market; on that basis, the HHI level embodied in the two dominant firms in this market is at least 1,764 + 900 = 2,664. That level markedly exceeds the threshhold range of 1,800 to 2,000, and so it indicates substantial market power.

42. More probably the two leading newspapers hold approximately 91 percent, if the market is correctly defined as the "general-readership" market. On that basis, the HHI value for the dual dominant firms is 2,809 + 1,444=4,453. That level is very high, more than double the threshhold value that indicates significant market power.

43. Second, there appear to be substantial barriers to entry into this market. Any newcomer must somehow draw customers away from the long-established duopoly newspapers, against their fierce resistance and strategies. Those two newspapers can use selective pricing, special discounts to readers and/or advertisers, promotional campaigns targeted at specific small rivals, and other advantages.

44. Above all, the Tribune and Sun-Times possess what appear to be the crucial best news services and syndicated features. Those items are simply withheld from the Daily Herald and other smaller newspapers. To that extent, the two leaders are able to avoid full competitive pressure from smaller competitors; nor can any other new entrants gain access to fair competitive resources.

45. In short, we have here a classic case of high monopoly power, indicated both by conditions in the market and by the difficulty of new entry. This assessment is not speculative; it reflects monopoly conditions that are widely known in the industry. Moreover, the trends suggest that the conditions are more likely to worsen than to abate.

7. The Daily Herald Appears to be an Efficient Competitor.

46. The Daily Herald is still only a small competitor in this market. Although it has been in a portion of the market for some time, it is still a new entrant, attempting to break out of its suburban toehold into the whole Chicago market.

47. In that effort, the Daily Herald appears to be a skillful and effective newspaper enterprise. It has built on its suburban origins, adding carefully as it sought a position in the wider market. It now offers a variety of specific editions, making maximum use of the journalistic resources that it is able to obtain.

48. The Daily Herald appears to produce a high quality newspaper, even though it is foreclosed by the defendants' exclusive agreements from access to the leading news sources and syndicated features which would increase its ability to attract readers and advertisers. It is the opposite of the small competitor that complains about supposed competitive disadvantages while lacking efficiency itself.

49. In short, the Daily Herald may be the single best possibility for moving this market toward effective competition. If it is unable to succeed, there appears to be no equally effective competitor that would.

8. Competitors and Competition.

50. It has become a cliche among some economists to assert that "the law protects competition but not competitors." The cliche does contain some truth for some situations, namely this: in a market that contains many

competitors, an effort to protect each one would impede the normal course of vigorous competition. But in the Chicago general-readership newspaper market, there are two dominant firms, rather than effective competition. The duopolists appear to hold crucial advantages over the one significant but much-smaller competitor that they face. Here the cliche is invalid.

51. The Daily Herald currently appears to be the only serious hope for moving toward effective competition. Therefore, exclusionary policies which block the Daily Herald also affect the whole state and prospects for competition.

52. In short, the exclusion of the Herald (and others) from the crucial services does reduce competition and prevent entry. It appears to ensure that competition will remain not effective.

9. The Exclusionary Policies May Not Maximize the Value of the Syndicated Materials.

53. The record contains some statements that the exclusionary policies maximize the value of the news services and syndicated features. But that view may be incorrect. At the least, it is a matter for discussion and study.

54. The value of the items might rise, not fall, if access were opened to more than one subscriber. A wider availability would provide more sources of payment, which might total to more revenues and profits, not less. The outcome might be complex, depending on the various elasticities of demand, under alternative conditions. There is a need for more economic evidence about

whether there is a valid basis in self-interest for such competition-reducing actions.

10. Though They may be Common, the Exclusions are Anticompetitive.

55. Even though the exclusionary policies may be common in this industry, they do have anticompetitive effects. Also, it may be possible to devise less-exclusionary approaches which would promote newspaper competition.

56. Experience in other industries supports my conclusion that the elimination of restraints would promote competition, innovation, and consumer welfare. An example in the electricity industry is a utility's refusal to "wheel" (that is, to transmit) bulk electric power for others across its own service territory. It is a way to block access to power by customers and other firms. Such refusals to wheel power have long blocked competition in emerging bulk power markets. The refusals are being opposed and perhaps eliminated in this industry by legislative and regulatory actions.

57. In another example, AT&T long refused to interconnect with other aspiring long-distance telephone companies, and it also refused to let "foreign" (that is, non-AT&T) equipment be attached to its wires by telephone users. These were among numerous anticompetitive policies which led to the decision to divest the Bell System in 1984. The removal of the policies, and the divestiture's opening of markets to new competition, has improved performance in the sector. It has also revitalized AT&T and its former subsidiaries.

Relevant Research and Related Sources

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William G. Shepherd, The Economics of Industrial Organization, 3d ed., Englewood Cliffs, NJ: Prentice-Hall, 1990.

George J. Stigler, The Organization of Industry, Homewood, IL: 1968.

Further affiant sayeth not.

s/ William G. Shepherd
Dr. William G. Shepherd

SUBSCRIBED AND SWORN TO
before me on April 11, 1994

s/ Jacqueline M. Creedon
Notary Public

My commission expires on 10/3/1998.

CURRICULUM VITAE September 1993

WILLIAM G. SHEPHERD

Office: Department of Economics, University of Massachusetts, Amherst, MA 01003 (Tel. 413-545-3815; Fax 413-545-2921)

Home: 155 Northampton Road, Amherst, MA 01002 (Tel. 413- 549-1177)

Born: August 15, 1936. Married, with four children.

Education:

Ph.D. and M.A., Economics - Yale University, 1963.

B.A., Economics - Amherst College, 1957 (with honors).

Positions:

Professor of Economics, University of Massachusetts, 1986 to the present.

Chairman, Department of Economics, University of Massachusetts, 1991 to the present.

General Editor, Review of Industrial Organization, 1990 to the present.

Professor of Economics, University of Michigan, 1971-86.

Associate and Assistant Professor of Economics, University of Michigan, 1963-71.

Special Economic Assistant to the Assistant Attorney General for Antitrust, U.S. Department of Justice, Washington, D.C., 1967-1968.

Visiting Professor: Williams College, 1982; University of Massachusetts, 1984-1985.

Fields of Teaching and Research:

Industrial organization. Public policies toward business, particularly Antitrust and Regulation. Microeconomics.

Books Published:

Public Policies Toward Business, 8th ed., Homewood, IL: Richard D. Irwin, 1991.

The Economics of Industrial Organization, 3d ed., Englewood Cliffs, NJ: Prentice-Hall, 1990 (with a Teacher's Manual). Englewood Cliffs, NJ: Prentice-Hall, 1990 (with a Teacher's Manual). Russian translation, in process.

Unconventional Wisdom: Essays on Economics in Honor of John Kenneth Galbraith, Boston: Houghton Mifflin, 1990, co-editor (with Samuel Bowles and Richard Edwards).

Mainstreams in Industrial Organization, 2 vols., Dordrecht: Kluwer Academic Publishers, 1986, co-editor (with H. W. de Jong).

The Ultimate Deterrent: Foundations of US-USSR Security Under Stable Competition, New York: Praeger Publishers, 1986.

The Economics of Industrial Organization, 2d ed., Englewood Cliffs: NJ, Prentice-Hall, 1985.

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Economics, Englewood Cliffs, NJ, Prentice-Hall, 1983 (with W.H. Locke Anderson and Ann Putallaz). Also Microeconomics, and a Teacher's Guide.

Economic Regulation: Essays in Honor of James R. Nelson, East Lansing: Michigan State University Press, 1981, co-editor (with Kenneth D. Boyer).

The Economics of Industrial Organization, Englewood Cliffs, NJ: Prentice-Hall, 1979.

Public Policies Toward Business, 6th ed., Homewood, IL: Richard D, Irwin, 1979.

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Public Enterprise: Economic Analysis of Theory and Practice, Lexington, MA: Heath-Lexington Books, 1976, editor.

Regulation and Entry, East Lansing: Institute of Public Utilities, Michigan State University, 1976, co-editor (with M.W. Klass).

The Treatment of Market Power, New York: Columbia University Press, 1975.

Public Policies Toward Business: Readings and Cases, Homewood, IL: Richard D. Irwin, 1975.

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Regulation in Further Perspective: The Little Engine that Might, Cambridge, MA: Ballinger Publishing, 1974, co-editor (with T.G. Gies).

Market Power and Economic Welfare, New York: Random House, 1970. Chinese edition, 1980.

Utility Regulation: New Directions in Theory and Policy, New York: Random House, 1966, co-editor (with T.G. Gies).

Economic Performance under Public Ownership: British Fuel and Power, New Haven: Yale University Press, 1965. Italian edition, L'economicita di Gestione Nell'impresa Pubblica, CIRIEC, 1968.

Articles and Contributions Published:

"Antitrust Repelled, Inefficiency Endured: Lessons of IBM and General Motors for Future Antitrust Policies," Antitrust Bulletin, Spring, 1994, in process.

"Constraining Hub Dominance in the Airline Industry," (with Lisa Saunders), Logistics and Transportation Review, September 1993, in process.

"DuPont and the Titanium Dioxide Industry," (with Douglas Dobson and Robert Stoner) a chapter in John Kwoka and Lawence J. White, eds., The Antitrust Revolution, 2d ed., New York: Macmillan, 1993, in process.

"Long Distance Telephone Service: Dominance in Decline?" a chapter in Larry L. Duetsch, ed., Industry Studies, Englewood Cliffs, N.J.: Prentice-Hall, 1993.

"Economic Criteria for Setting National Defense Spending," chapter in Manas Chatterji, ed., Economic Issues in World Disarmament, New York: Macmillan, 1993, in process.

"Ramsey Pricing: Its Uses and Limits," Utilities Policy, October 1992.

Regulation and Efficiency: A Reappraisal of Research and Policies, Columbus, Ohio: National Regulatory Research Institute, Ohio State University, August 1992, 88 pages.

"Market Dominance under U.S. Antitrust," Review of Industrial Organization, 6 (Summer 1991), pp. 161-76.

"Economic Analysis to Guide Antitrust Enforcement: Prospects for Section 2," New York Law School Law Review, 35 (Fall 1991), pp. 917-38.

"Theories of Industrial Organization," chapter in Harry First, Eleanor M. Fox and Robert Pitofsky, eds., Antitrust for Its Second Century, Westport, Conn.: Greenwood Press, 1991.

"Section 2 and the Problem of Market Dominance," in A Symposium on the 100th Anniversary of the Sherman Act and Upon the 75th Anniversary of the Clayton Act, The Antitrust Bulletin, 35 (Winter 1990), pp. 833-78.

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"The Process of Effective Competition," Review of Industrial Organization, Autumn 1990.

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"Mainstreams and Recent Schools in Industrial Organization," Revue Economique, May 1990.

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"On the Nature of Monopoly," chapter in Samuel Bowles, Richard Edwards and William G. Shepherd, eds., Unconventional Wisdom: Essays on Economics in Honor

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"Efficient Profits vs. Unlimited Capture, as a Reward for Superior Performance: Analysis and Cases," Antitrust Bulletin, Spring 1989.

"Capital Gains as Economic Rent," Review of Social Economy, Summer 1989.

"Self-Interest and National Security," American Economic Review, May 1988.

"Mainstream Economic Criteria in Fourteen Recent Antitrust Cases," Antitrust Law and Economics Review, 1988.

"Three 'Efficiency School' Hypotheses About Monopoly Power," Antitrust Bulletin, Summer 1988.

"Public Enterprise: Criteria and Cases," chapter in Henry W. de Jong, ed., The Structure of the European Economy, 2d ed., The Hague: Martinus Nijhoff, 1988.

"Vindicating Private Antitrust Litigation: A Review Article," Antitrust Law and Economics Review, 1988.

"Contestability and Railroad Mergers," International Journal of Transport Economics, June 1988.

"Converting Dominance to Competition: Criteria for Effective Deregulation," chapter in Harry M. Trebing, ed., New Regulatory and Management Strategies in a Changing Market Environment, East Lansing: Institute of Public Utilities, Michigan State University, 1987.

Four articles in The New Palgrave's, London, Macmillan, 1987, on: "Market Share," "Concentration," "The Hirschman-Herfindahl Index," and "Joe S. Bain."

"Tobin's Q and the Structure-Performance Relationship: A Comment," American Economic Review, December 1986.

"On the Core Concepts of Industrial Economics," chapter 2 in Henry W. de Jong and William G. Shepherd, eds., Mainstreams in Industrial Organization, 2 vols., Dordrecht: Kluwer Academic Publishers, 1986.

"Assessing 'Predatory' Actions by Market Share and Selectivity," Antitrust Bulletin, Spring 1986.

"Illogic and Unreality: The Odd Case of Ultra-Free Entry; and Inert Markets." in R. E. Grieson, ed., Regulation and Antitrust, Lexington, Mass.: D.C., Heath, 1986.

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"Winning Bids in Five Types of Auctions: Concentration Matters," Antitrust Bulletin, Spring 1984.

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"Concepts of Competition and Efficient Policy in the Telecommunications Sector," in Eli Noam, ed., Regulation and New Telecommunications Networks, 1983.

"Sustainability, Entry Restrictions, and Induced Technological Bias," Quarterly Review of Economics and Business, Winter 1982 (with David Sappington).

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"Public Enterprise: Purposes, Performance, Structure," in W.T. Stanbury and F. Thompson, eds., Managing Public Enterprises, New York: Praeger, 1982.

"Price Structure in Electricity," in A.L. Danielson and D.R. Kamerschen, eds., Current Issues in Public Utility Economics: Essays in Honor of James C. Bonbright, Lexington, MA: Heath-Lexington Books, 1982.

"Sustainability and Competition," chapter in Thomas G. Gies and Werner Sichel, eds., Deregulation: Appraisal Before the Fact, Ann Arbor: Bureau of Business Research, University of Michigan, 1982.

"Sustainability, Deregulation and Separate Subsidiaries," in Harry M. Trebing, ed., Regulatory Issues in the 1980s, East Lansing: Institute of Public Utilities, Michigan State University, 1981.

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"British and United States Experience," in P. Fernandes, ed., Financing of Public Enterprises in Developing Countries, Ljubljana, Yugoslavia: International Center for Public Enterprises, 1979.

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"Bain's Influence on Research into Industrial Organization," chapter 1 in R.T. Masson and P.D. Qualls, Essays on Industrial Organization in Honor of Joe S. Bain, Cambridge, Mass.: Ballinger, 1976.

"Rate Structure, Social Efficiency and Equity," chapter in Harry M. Trebing, ed., New Dimensions in Public Utility Pricing, East Lansing: Institute of Public Utilities, Michigan State University, 1976.

"General Conditions of Entry," a chapter in Michael W. Klass and William G. Shepherd, eds., Regulation and Entry, East Lansing: Institute of Public Utilities, Michigan State University, 1976.

"Banking," chapter in Walter Adams, ed., The Structure of American Industry, 5th ed., New York: Macmillan, 1976; and (with Arnold Heggestad) in the 6th and 7th editions.

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"Managerial Discrimination in Large Firms," Review of Economics and Statistics, November 1973.

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"Structure and Behavior in British Industries, with U.S. Comparisons," Journal of Industrial Economics, July 1972.

"Elements of Market Structure: An Inter-industry Analysis," Southern Economic Journal, April 1972.

"The Elements of Market Structure," Review of Economics and Statistics, February 1972.

"Large-Firm Employment Policies Toward Blacks and Women," Report to U.S. Office of Economic Opportunity, Washington, D.C.: 1971.

"The Margin of Competition in Communications," chapter in William M. Capron, ed., Technological Change in Regulated Industries, Washington, D.C.: Brookings Institution, 1971.

"Changing Contrasts in British and American Antitrust Policies," chapter in Werner Sichel, ed., Antitrust Policy and Economic Welfare, Ann Arbor: Graduate School of Business, University of Michigan, 1970.

"Regulation and its Alternatives," Stanford Law Review, February, 1970.

"Market Power and Racial Discrimination in White-Collar Employment," Antitrust Bulletin, Spring 1969.

"Leading-Firm Conglomerate Mergers," Antitrust Bulletin, Winter 1968 (with James S. Campbell).

"Alternatives for Public Expenditure," chapter in Richard E. Caves and Associates, Britain's Economic Prospects, Washington, D.C.: Brookings Institution, 1968.

"What Does the Survivor Technique Show About Economies of Scale?" Southern Economic Journal, July 1967.

"On Appraising Evidence About Market Power," Antitrust Bulletin, Spring 1967.

"Regulatory Constraints and Public Utility Investment," Land Economics, August 1966.

"Residence Expansion in the British Telephone System," Journal of Industrial Economics, July 1966.

"Marginal-Cost Pricing in American Utilities," Southern Economic Journal, July 1966, and "A Reply," ibid., January 1967.

"Changes in British Industrial Concentration, 1951-1958, " Oxford Economic Papers, March 1966.

"Comparative Economic Systems: Nationalized Industry," American Economic Review, May 1965.

"Cross-Subsidizing: A Reply," Oxford Economic Papers, March 1965.

"British Nationalized Industry: Performance and Policy," Yale Economic Essays, Spring 1964.

"Trends of Concentration in American Manufacturing Industry, 1947-58," Review of Economics and Statistics, May 1964.

"Cross-Subsidizing and Allocation in Public Firms," Oxford Economic Papers, March 1964.

"Development Loans to Private Borrowers," Economic Development and Cultural Change, April 1964.

"Simultaneous Equations Techniques," chapter in Geoffrey S. Shepherd, Agricultural Price Analysis, 5th edition, Ames: Iowa State University Press, 1962.

"On Sales-Maximizing and Oligopoly Behavior," Economica, November 1962.

"A Comparison of Industrial Concentration in the United States and Britain," Review of Economics and Statistics, February 1961.

"Competition and Growth: The Lesson of West Germany-A Comment," American Economic Review, December 1960 (with Alasdair I. MacBean).

Research in Preparation or Submitted:

Competition and Progress, a book-length reassessment of the nature of competition and of policies toward monopoly.

Economic Foundations of National Security: Self-Interest and Global Interests.

"Competition and Extremism: Failures in the Marketplace of Ideas"

"The Determinants of Optimal Military Expenditure"

"Thinking About National Safety and the Cold War"

"The Emergence of Dominance: Properties of Instability in the Competitive Process"

"Dominance, Price Discrimination and Contestability"

"DuPont and the Titanium Dioxide Case" (with Douglas Dobson and Robert Stoner)

"AT&T and Market Dominance in Long-Distance Telephone Service"

Other Professional Activities:

Chairman, The Transportation and Public Utilities Group of the American Economic Association, 1976-1977.

President, the Industrial Organization Society, 1990-1991.

Preparation of numerous conferences on industrial organization, antitrust, regulation and public enterprise.

University of Glasgow, Fulbright Fellowship, 1959-60.

Research in Britain, in 1959-60, 1962, 1964, 1967, 1969, 1971, 1974, 1978, 1985 and 1987.

Ford Foundation Faculty Fellowship, 1967-68 (declined).

Numerous book reviews, refereeing of articles and books, screening research proposals, comments on other papers in conference volumes, etc.; not listed individually here.

Addresses and seminars at various universities and colleges in the U.S. (University of Chicago, University of Michigan, University of Cincinnati, Wesleyan University, Amherst College, Miami University, University of Miami, University of Wyoming, Michigan State University, Middlebury College, College of William & Mary); Canada (McGill University, Dalhousie University); Britain (London School of Economics, Oxford University, Cambridge University, University of Lancaster); Europe (University of Amsterdam, University of Louvain, University of Rome); China (Nankai University) and Japan (Doshisha University).

The Merrill Center for Economics, Associate Conferee, Summer 1956.

Invited 4-week lecture series on Industrial Organization, Mankai University, Tianjin, China, April-May 1983. Further lectures at Nankai University, May, 1989.

Director of Graduate Studies, Chairman of the Graduate Program Committee, and Chairman of the Graduate Admissions and Fellowships Committee, Department

of Economics, University of Michigan, 1966-67, 1968-70.

Director of Graduate Studies in Economics, University of Massachusetts, 1990-91.

Currently Member, editorial board, Antitrust Bulletin.

Statement and testimony for the Subcommittee on Antitrust and Monopoly, U.S. Senate; on industrial concentration, 1965; on antitrust policy in Britain, 1968; on discrimination in managerial employment, 1972; and for the House Committee on Energy, on Electric Sector competition, 1985.

Advisor at various times to: Antitrust Division, U.S. Department of Justice. U.S. Federal Trade Commission. U.S. Senate Subcommittee on Antitrust and Monopoly. Regulatory commissions in Massachusetts, New Jersey, the District of Columbia and Michigan. The African Development Bank, Abidjan, Ivory Coast. Various city governments, foundations, and private companies.

Testimony as an expert witness in various antitrust, regulatory and tax proceedings, including cases involving IBM Corp. (California Computer Products), AT&T (Diversified Industries), DuPont Company (the titanium dioxide case), G.D. Searle, Pfizer Inc. (International Rectifier), the Santa Fe and Southern Pacific railroad merger, Southern California Edison (Cities of Anaheim et al.); and before the Federal Energy Regulatory Commission and the Florida, District of Columbia, and Massachusetts regulatory commissions.

Chairman, the Ann Arbor Cablecasting Commission, 1973.

Included in Who's Who in Economics: A Biographical Dictionary of Major Economists, 1700-1980, by M. Blaug and P. Sturges, London: 1983; and in the revised edition, 1986.

Co-Editor (with Henry W. de Jong) of the series, Studies in Industrial Organization, Dordrecht: Kluwer Academic Publishers.

[Dated April 12, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD, Plaintiff, v. CHICAGO TRIBUNE COMPANY, et al., Defendants.	)	Civil Action No. 93 C 7493
	)	Judge John A. Nordberg
	)	Magistrate Ronald A. Guzman

AFFIDAVIT OF WILLIAM J. WOESTENDIEK

WILLIAM J. WOESTENDIEK, on oath, deposes and states that:

1. I have been Director of the University of Southern California School of Journalism since 1988. I began my career in journalism in 1948 at the *Winston-Salem Journal*, working my way up to city editor. I joined *Newsday* in 1955 as editorial director and assistant to the publisher. I organized Newsday's first Washington bureau. I spent three years as managing editor of the *Houston Post* and six years as editor and publisher of the *Colorado Springs Sun*. I then served as executive editor of the *Arizona Daily Star* in Tucson. Before taking my current position, I was executive editor of the *Cleveland Plain Dealer* for five years. My résumé is attached to this affidavit. I have been retained by Paddock Publications, Inc. as an expert on the newspaper industry.

2. I have reviewed the defendants' motion to dismiss or alternatively for summary judgment and their supporting declarations and documents. Over the span of my career, I often had to deal with the selection of features and auxiliary news services and with the issue of exclusive licenses to such news services and features. I have been an editor of larger papers that had the advantage of such exclusives, and I have been with smaller papers that were blocked by such exclusives. The opinions that I state in this affidavit were formed as a result of those experiences.

3. I believe that the restrictions on the use of leading auxiliary news services and top-rated features resulting from the exclusive licenses granted to the *Chicago Tribune* and *Chicago Sun-Times* have a definite negative impact on competition. This practice protects the interests of the two newspapers, leaving the *Daily Herald* to select from what could be called "leftovers," features not wanted by the two large Chicago papers.

4. The defendants contend that other auxiliary news services are available apart from the New York Times and the LA Times/Washington Post News Services. This is true but I think the other services are not comparable in quality, prestige and depth to the other two, an opinion I think you would find shared by most newspaper editors and observers in the country.

5. Additionally, the top two auxiliary news services serve their subscribers in more ways than one. In addition to the in-depth, interpretive byline pieces they offer, their material also can be used by the subscribing newspaper as excerpts in another story, as a source of information for additional news stories and as a verification

check on a newspaper's other information about a story. It should also be pointed out that, generally speaking, most subscribing newspapers use a relatively small amount of the copy moved by the news services.

6. I feel strongly that a newspaper trying to compete without the NY Times or LA Times/Washington Post services is at a distinct disadvantage in the area of total news coverage. My own experience, which primarily involved having the NY Times service, proved to me the value of having such a service.

7. In the area of syndicated features, the defendants, possibly because they hold all the "big cards," keep talking about such things as the large number of features available (5,000), a "cornucopia" of established features, of promoting diversity by developing one's own features, and of giving readers a wider choice. I have several disagreements with their positions.

8. Sure, there are several syndicates and many, many features, but, again as the defendants know so well and which is understandably why they try so zealously to guard the "box office stars" they have, there are no equivalents, except for the occasional new star who bursts into print.

9. Look at some of the "stars." Dear Abby and Ann Landers have no real competition. And when Ann Landers left one of the defendant newspapers, its efforts to find a replacement resulted in less than spectacular results. Columnists like Dave Barry and Mike Royko have local and national followings. So, too, do editorial cartoonists like Paul Conrad, Doug Marlette, and Benson. Again, speaking from experience, editorial car-

toonists can be developed. But a "cornucopia?" I haven't seen it.

10. I think it is a little smug and a little arrogant for those who have, such as the defendants in this case, to tell those who don't have to "develop your own talent." It does happen, that's how many of today's top talent got started, but it doesn't happen that often and it usually doesn't happen at newspapers with lesser resources and smaller circulations. The *Chicago Tribune*, for example, has a good track record of developing great people. So do a lot of the other major American newspapers. But again, speaking from experience, if a smaller newspaper develops someone who shows star quality, she or he is going to be hired away by a larger, richer newspaper.

11. I am not advocating that the *Chicago Tribune* be forced to share any of its home-grown talent with anyone else. The *Daily Herald* is not seeking such talent from the *Tribune* and it shouldn't be.

12. I think comic strips deserve a special niche of their own in this case, because they are so important to so many readers. Again, the same general opinion holds true: There are some very good comic strips, some fair ones and a lot of inferior ones. The newspapers with the money and the clout to get the most popular strips (Peanuts, Doonesbury, Calvin and Hobbes, The Far Side, etc.) know they have, so to speak, money in the bank with those strips because comic strip fans are fantastically loyal to their favorites. I don't believe many really good new comic strips have been developed in recent years.

13. In my view, then, the use of exclusive licenses is not leading to the development of good new features.

14. Local news, of course, is a different element in the competition and an area in which the *Daily Herald* does an excellent job, as it should. It is very difficult for a major city newspaper to do as well in covering one of the outlying communities, be it in Los Angeles, New York, or Chicago. The local editors and reporters know their community, its people and its problems and are better equipped to cover it. On special occasions or late-breaking stories the home town paper should be ahead, as exemplified by the *Daily Herald*'s superior election coverage of the Illinois primary in March in which it was able to print final election results in local races in its home-delivered editions which the major Chicago papers, because of deadlines, could not print in their home-delivered editions.

15. Having reviewed several copies of the *Daily Herald* and the two major Chicago dailies, I think the *Daily Herald* has its own distinct style and format, considerably different from the *Sun-Times* and *Tribune*. I don't think it in anyway attempts to mimic or copy the larger newspapers. It offers its readers an attractive news package every day, a package that could be improved if the editors of the *Herald* could have access to a top wire service and top features.

16. Finally, to face the question of whether exclusive contract restrictions on news service and syndicate features can be justified, I frankly do not think so. This was not always true in my case, since I once felt, growing up in the business, that it was natural to take advantage of what was offered. However, based on my experience over the years, as a participant and an observer, I no longer think so. I feel it is wrong and gives larger newspapers an unfair advantage.

Further affiant sayeth not.

s/ William J. Woestendiek
William J. Woestendiek
4/12/94

SUBSCRIBED AND SWORN TO
before me on April 12, 1994.

s/ Mary D. Johnson
Notary Public

My Commission Expires February 14, 1996

My commission expires on _____.

venue: District of Columbia

RESUME OF WILLIAM J. WOSTENDIEK

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William J. Woestendiek has been the director of the University of Southern California School of Journalism since 1988, during which time he has played a key role in increasing the school's visibility and prestige throughout the country and been instrumental in raising funds for the School and the University.

Woestendiek has served as editor, publisher and assistant to the publisher at five different newspapers in addition to being a television news anchor person and a magazine editor. Prior to coming to USC, Woestendiek had been executive editor of The Plain Dealer in Cleveland, OH for five years.

Before going to Cleveland, Woestendiek was executive editor of The Arizona Daily Star in Tucson, Arizona for six years, during which time he directed coverage that won that newspaper's first Pulitzer Prize.

Woestendiek began his journalism career in 1948 in Winston-Salem, NC, working his way up to city editor. He joined Newsday in 1955 as editorial director and assistant to the publisher, Alicia Patterson, with whom he worked in the overall direction of the newspaper. He organized and directed Newsday's first Washington Bureau. He also won the 1962 Sigma Delta Chi Distinguished Foreign Correspondence Award for his reporting on the Soviet Union.

Following three years as managing editor of The Houston Post in the mid-sixties (during which time he directed coverage that won the Post's only Pulitzer Prize) he was hired by IBM as editor of its then prestigious magazine, THINK. He later served as editor of THIS WEEK Magazine in New York City.

In 1969 Woestendiek went into television in Washington, D.C., where he created, organized, produced and served as anchorman for NEWSROOM, a nightly hour-long news program on public television station WETA-TV.

He returned to newspapering in 1970 as Editor and Publisher of The Colorado Springs SUN. During his six years there, The SUN doubled its circulation and won many state and national awards. Woestendiek's daily column was named "Best Column of the Year" in 1974 by the American Newspaper Association.

Woestendiek is a native of upstate New York. He is a graduate of the University of North Carolina and has a Masters Degree from the Columbia School of Journalism. He was a Nieman Fellow at Harvard in 1954-55. He is a veteran of World War II and the Korean War, in which he served as an Army Intelligence Officer.

Woestendiek has been an editor-in-residence at many journalism schools throughout the country, including North Carolina, Kansas, Texas, NYU, Arizona, Missouri, Colorado and California. He has been active in Poynter Institute and American Press Institute seminars, both as a participant and a seminar leader. He has been a Pulitzer Prize juror five times. He is past president of the Arizona Newspaper Association and has twice been chairman of the ASN Journalism Education Committee.

He is a Phi Beta Kappa, a member of Sigma Chi and a Rotarian. He is a member of the Council on World Affairs and serves on the board of trustees of New Directions for News and the Foundation for American Communications.

Woestendiek and his wife, Bonnie, have five children. A son, John, who works for the Philadelphia Inquirer, won the Pulitzer Prize for investigative reporting in 1987.

MR. SIMOWITZ: Let me object to the form of the question and inquire, Jim, whether you're asking him about what's going on at United Media today.

MR. MALYSIAK: Given his experience and expertise in the industry.

A. There is obviously very few properties that have reached the proportions of Garfield and Peanuts. How those come about and become that popular, you know, it is like a hit movie or a hit book, a best seller. Who knows? It happens and it catches on.

Q. Peanuts is still with United Media?

A. Correct.

Q. How long has it been with United Media?

A. Since its inception, which was 43 years ago, 42 years ago.

Q. How long ago had Garfield been with United Media?

A. Since 1977, I'm sorry, '78. It is 16 years old.

Q. So it came with you and then it left?

A. You know, that's right. It did. That's right.

newspaper industry?

A. Well, I don't personally know to the extent I wasn't there when it started. I don't know who the first one to do it was. I don't know the year it occurred or what feature it occurred with, but I am familiar with the theories of it and the rationale for it and what our general practices were during the time I was at United Media.

Q. Did you ever have any conversations with any newspaper people about why there were exclusives?

A. Oh, sure.

Q. Do you recall in particular any conversations?

A. Sure, with the Lesher newspaper people and the San Francisco people area. With Bob Maynard of the Oakland Tribune.

Q. Any others?

A. Not specifically that I can recall. I'm sure that I discussed it many times throughout my career.

Q. With the Lesher newspaper what do you recall the occasion was for your discussion?

A. The editor picked up the phone and called me and said, "We want the features", and I said, "I'm

sorry, we can't sell it to you."

Q. When was this?

A. A year ago, a year and a half ago.

Q. You mentioned Bob Maynard of the Oakland Tribune?

A. Yes.

Q. What happened then?

A. He called me up and I was out in San Francisco and he took me out to lunch with his lawyer and said, "Why in the world do you people block people from publishing popular news strips like Peanuts and Garfield", and we had lunch and it was a very enjoyable conversation.

Q. In those conversations did you discuss the general practices that you understood?

A. Correct.

Q. In either of those cases did you end up selling any features that had been exclusive to somebody in the market?

A. Yes.

Q. What happened in the Lesher situation?

A. In the Lesher situation they brought a suit against us and the San Francisco Chronicle. It was our contract with the Chronicle that blocked the

Lesher papers and the parties agreed and came to a settlement whereby the Lesher papers ended up being able to publish the features that they wanted.

Q. How about the Bob Maynard situation and the Oakland Tribune?

A. Bob Maynard struck a deal with Dick Theirot, the publisher of the San Francisco Chronicle and the San Francisco Chronicle sent us a letter that said, "We choose not to enforce the provision in our contract that prohibits the sale of the particular features. So feel free to sell them to the Oakland Tribune", which we did then.

Q. Which features were they?

A. I believe they were Marmaduke and Peanuts and Garfield. There may have been others. The particular nature of the deal that Theirot and Maynard struck was that the Chronicle would release three features per year for two or three or four years. It was kind of a strange thing so they got to pick which ones they could buy over a three-year period and when and what order.

Q. You mentioned the Lesher newspaper, is that some sort of group of newspapers?

A. In the San Francisco bay area, yes.

Q. Do you recall with respect to perhaps it was the same with respect to both these occasions what was the definition of the geographic scope of the exclusive that the Chronicle had?

A. I believe it was a 50-mile radius. I believe. It quite possibly could have been translated into particular counties on some contracts. I don't recall exactly how the contract with the Chronicle was worded.

Q. When was the Bob Maynard contact made?

A. '89, 1989. That's a guess.

Q. Do you know whether as a result of those contacts and those changes in the scope of the exclusive as a result of these contacts did United Media get more license fees out of that market?

MR. SIMOWITZ: Object to the form of the question.

A. I don't understand the question.

Q. Let me strike the question.

A. All right.

Q. After those agreements were made that you have described allowing these papers to publish those features, you then, United Media, got fees from these new licensees?

A. Yes.

Q. Did the Chronicle's fees go down?

A. Yes.

Q. Do you know how that compared? Did the Chronicle fees go down more than the other fees?

A. I don't really recall. It was not something that we had a wonderful month economically because we were able to sell the features. It was roughly a wash.

Q. Do you recall any other circumstances like that where the geographic scope was cut back to allow some papers to publish the features that they hadn't been allowed to publish?

A. Yes, in Chicago.

Q. Which one was that?

A. That had to do with the Chicago Sun-Times and the Copley newspapers and suburban newspapers which are located in Joilet, Aurora and at that time, Wheaton. They were on the fringe of the 50-mile exclusive. They requested Garfield, to publish Garfield, and pointed out that the Sun-Times circulation that far out had been falling. The nature of the paper over the years had changed into more of a commuter tabloid paper. They were not aggressively

soliciting home circulation that far out in those communities.

We, David Hendin and I, had lunch with the then publisher of the Chicago Sun-Times and owner I believe, Bob Page, and explained to him that we thought that we were perfectly able to sell exclusive distribution deals within competitive markets, but that over the years perhaps the Sun-Times was not as competitive in those markets and he might want to consider altering our agreement so that those papers could publish those features and he agreed and so the scope of exclusivity was cut back.

Q. Do you recall when that was?

A. '86.

Q. A similar question that I asked with respect to the bay areas once as a result of that change you began getting fees from the Copley newspapers?

A. Correct.

Q. Do you know when the Sun-Times fee for those features went down?

A. You know, I don't recall. I'm sure we could find out.

Q. That should be in the record somewhere?

A. It should be.

Q. Any other occasions like that that you can recall?

A. There probably were, I don't recall. I will offer to you that the Boston exclusive market as you are aware is unique because of the consent decree which requires the Boston Globe to each year send us a statement on where they've achieved, what counties they have achieved a 20 percent penetration and so each January we would get a letter and while I think almost every year was the same counties, there might have been a county drop off and come on and so forth. So the Boston exclusive area switched. It is possible it switched during that time.

Q. In terms of general practices at United Media did you have a general practice as to when you would offer a feature on an exclusive basis?

A. We would offer—we didn't offer exclusivity. It was almost always at the request of the newspaper. It was almost always in terms of what historically had been done. It almost always involved new features. The majority of the time, comic strips.

Q. Let's start with this, if you had a new comic strip. How would you offer that to a particular

rest of the country where there's not competition if the papers can say, "Well, we'll wait and see how popular it becomes", then it would never start and it would never go on to its next month because there would be nobody to run it while everybody waited to see if it would become popular.

Q. But as you say your form agreements would generally only give a 30-day guaranty?

A. Correct.

Q. So do you give some sort of guaranty as a general practice to that newspaper trying a new feature beyond the 30 days?

A. I think implicit in the agreement that I described is that we would not then, once it becomes widely popular, seek to renegotiate that 30-day understanding on different terms. That agreement can be canceled by either party on 30 days notice, but it becomes the agreement and the establishment of a relationship that hopefully will last forever as that feature grows. So for us to come back in and say, "Well now everything is changed that untried, unpublished, untested feature has now become popular and others want to publish it so we're going to take the exclusivity away", would not be a wise business

move.

Q. I want to focus on this implicit part of this situation that you mentioned. Is there some period of time that's implicit that you would not, you implicitly agreed you would not remove the exclusivity?

A. No, sir. What we do is we enter into an agreement, an exclusive agreement, and say for instance that it's 30 days. Somebody has to actively cancel that contract in order for it to change. We would not as a normal practice if a feature becomes popular go in and cancel a contract on anybody that has bought the feature unless there was some very unusual circumstances. It has been very few times in the industry.

So the agreement that we negotiate at Day One, again, when the feature is untested and untried and they take that risk we live by that agreement that we made from Day One and we don't say, "You know if it becomes popular one year, two years or three years down the road all bets are off on the exclusive." They take the gamble. They're investing their money in what could be a popular feature and we live by the agreement from the outset.

Q. So that are you saying that that's understood with the newspaper?

A. It is in the contract.

Q. But in the sense that you would not exercise the termination right that you're given by your contract?

A. Right.

Q. Is that understood by the newspaper?

A. Yes, I think it is understood by the newspaper that if both sides live up to the contract that it won't be terminated. Now the newspaper, of course, if the newspapers do the cancelling in this business the syndicates don't cancel features on newspapers or we're asking for big trouble there. It has been done very seldom.

I described a situation with the Sun-Times where we said, "We've got this contract and the situation has changed a little bit, the nature of the paper as the years go by, we ought to talk about that." That was not initiated by us going in saying, "Whoops, Times, we cancelled the contract." We negotiated that and brought it up with them in a normal business relationship.

Q. When you say it is implicit, are you

saying that it is a practice in the industry that everybody understands and abides by?

A. I think it is a practice in the industry and if you sell a new comic strip to a newspaper and you grant them an exclusive distribution area that you are not going to come in in any period of time later and cancel that agreement. I would say that is a normal thing that it is implicit in that I don't think it is repeated every time a new contract is signed. I think there is some trust with the newspaper that you will intend to live up to your end of the deal.

Q. You mentioned in this context the newspaper's investment of money. What type of investment of money do newspapers make in a feature?

A. The investment would involve several different areas. A monetary area which would be the fee for the feature. They invest an editorial decision to cancel the feature that's appeared in the feature in order to put a new one in. They invest the space, if you will, which is very valuable to newspapers.

Q. On occasion do you enter into new written agreements for a feature that has already been licensed to that particular newspaper?

of the question. I simply don't understand it.

Q. Do you understand the question?

A. Was there a risk that the Tribune had in publishing Peanuts?

MR. SIMOWITZ: I think the question is in the process of being withdrawn or rephrased. Wait for the next one.

Q. Look at Exhibit 3 where you talk about getting a newspaper to gamble on a new feature?

A. Correct.

Q. You described in your testimony how exclusivity relates to that. In 1988 the Tribune didn't have to gamble on Peanuts, is that correct?

A. Agreed.

Q. Why not at that point then say, "Listen, Tribune, you don't get an exclusive territory any more, there's no longer any risk, you've had 30-some years of Tribune having Peanuts on an exclusive basis. We now are going to license this on a nonexclusive basis."

MR. SIMOWITZ: Object to the form of the question.

You may answer.

A. I think the best way to answer is to try

to repeat again that at the beginning of the relationship on an untried feature the newspaper wants to be able to be the exclusive provider of that comic strip within their circulation area should it become widely popular or popular. For us to step in two months, five years, 30 years later and say, "Okay, now everything has changed", in fact, they wanted the exclusive distribution in the event that it became popular and we granted that to them. So when it becomes popular because we have an out in the contract to go in and say, "Sorry, we've changed our minds", is not something that we would have done.

MR. SIMOWITZ: Can we go off the record for a second?

MR. MALYSIAK: Sure. Off the record.

(Discussion off the record.)

MR. MALYSIAK: Back on the record.

Q. Mr. Simowitz found that he did have a copy of the second page of Exhibit 4, the Peanuts agreement with the Tribune and I obviously should have it as well and didn't get a copy of it here. So if we could, we'll just add what's number UFS 0351 to Exhibit 4. So it is a two-page exhibit now and, Mr.

STEVEN HAROLD CHRISTENSEN, 4

having been duly sworn, testified as follows:

EXAMINATION

BY MR. MALYSIAK:

Q. Please state your full name.

A. Steven Harold Christensen.

Q. Where do you work?

A. Los Angeles Times Syndicate.

Q. What is your position there?

A. I'm the vice president and general manager of the domestic syndicate.

Q. What are your responsibilities?

A. I oversee the day-to-day operations of the domestic sales staff and, in addition to that, the editorial staff, production staff, promotion staff, art department and sales coordination.

Q. How long have you been with the LA Times Syndicate?

A. Almost nine years.

Q. What is the corporate relationship between the LA Times Syndicate and the Times Mirror Company?

A. Well, I'm not sure technically what it is. My best understanding is that the LA Times Syndicate is a

Q. What positions have you had at the LA Times Syndicate from the beginning until now?

A. I started as the managing editor. About three years, three or four years later, I became the editor. Couple of years after that, about 1991, I became the editor and acting sales manager. And in 1993, I became the vice president/general manager.

Q. What specific responsibilities do you have for the syndication of your features?

A. You mean in what capacity? Sales?

Q. In any capacity.

A. Well, I supervise the editorial department. I guess I have kind of far-reaching supervisory responsibility for promotion, production, editorial content and domestic sales.

Q. What does the editorial department do with features?

A. Well, it varies. In some instances, we are the only line editor for columnists, and we do a lot of editing on them. And in other cases, we are basically taking up material that has already been edited, and it's more of a trafficking operation.

Q. What is your responsibility for sales?

A. I supervise the domestic sales reps.

Q. What type of activities does that entail for

conflict, that you can recall of that sort?

MR. MAYERS: Assuming you can recall more than one.

THE WITNESS: I can't recall a recent conflict.

Q. BY MR. MALYSIAK: Has the geographical scope of the exclusive licenses you grant changed over time while you have been with the firm?

A. I don't know.

Q. Do you have any general practice as to how long the exclusive license is good for?

A. No.

Q. In general, how long do the exclusive licenses last?

A. They typically last until either party serves notice that they are going to be terminated.

Q. Does the LA Times Syndicate ever terminate exclusive licenses?

MR. MAYERS: Just for clarification, are you distinguishing exclusive licenses from licenses, or are you using that term for the licenses that they grant—

MR. MALYSIAK: Exclusive licenses.

MR. MAYERS: —which covers all his licenses?

MR. MALYSIAK: Yes.

MR. MAYERS: So you are not talking about exclusivity. You are talking about terminating the license. That's the question I had.

MR. MALYSIAK: Right, right.

THE WITNESS: I think the answer to that is not without the agreement of the party that holds the license, to my recollection.

Q. BY MR. MALYSIAK: Now, just to clarify the point that Dan brought up—

MR. MAYERS: Yes, I'm confused now.

Q. BY MR. MALYSIAK: Do you recall any occasions when the LA Times has terminated a license?

A. Yes.

Q. In what circumstances do you terminate a license?

A. Well, there may be several reasons to terminate a license.

Q. What are they?

A. They might include a desire on the part of the contributor to have a column appear in a market where it's not being published, but these are very rare.

Q. Can you recall any occasions when the LA Times Syndicate has terminated a license in a particular market so as to license some other newspaper in that market?

A. Yes.

Q. Does that often occur?

A. No.

Q. Under what circumstances would that occur, typically?

A. I don't think there is a typical circumstance.

Q. Do you recall any occasions of that in the Chicago market?

A. Any occasions of what?

Q. Where the LA Times Syndicate has terminated a license so that it could license a different newspaper in the market.

A. Not to my knowledge, no.

Q. I take it licensees do terminate licenses?

A. Yes.

Q. Is that fairly frequent?

A. Yes.

Q. Much to your chagrin at times, I imagine.

A. Yes.

Q. Can particular licenses go on for many years?

A. Yes.

Q. Do you happen to know the longest running license you have in your collection?

A. No.

Q. Do you use for licensing features two-party contracts in written form?

MR. CARTER: That was probably a very honest answer.

Q. (By Mr. Malysiak) Have you had any situations in any area that you cover, any market that you cover where there was exclusivity at one time in the market, somebody had an exclusive, and then that exclusive was lost or gone and you were able to sell to more clients?

A. Yes.

Q. Was there one market in particular or more than one?

A. Indianapolis.

Q. Okay. When was this?

A. Within the last year.

Q. I don't know the Indianapolis newspaper. Was there one paper there that had exclusivity from Universal?

A. Yes.

Q. Which paper was that?

A. The Indianapolis Star.

Q. Are there other dailies in Indianapolis other than the Star?

A. Not within the city proper.

Q. In the suburban areas?

A. Yes.

Q. What other paper dailies are there that you deal with?

A. Anderson, Indiana.

Q. Anything else?

A. Muncie.

Q. Any others?

A. Noblesville.

Q. Anything else?

A. No.

Q. That's it. Okay. Did the exclusives at Universal sold to the Indianapolis Star cover Anderson, Muncie and Noblesville?

A. Anderson.

Q. Just Anderson?

A. And Noblesville.

Q. What were the features that the Indianapolis Star had on an exclusive basis from Universal?

A. That's hard to say.

Q. Why is that?

A. 65 features. I can't remember on a piecemeal basis.

Q. In your own mind are there certain of your inventory features that you consider your

leading ones?

A. Yes.

Q. Which ones are those?

A. Calvin and Hobbs.

Q. Okay.

A. Far Side.

Q. Any others?

A. No.

Q. Why do you consider those two the leading ones?

A. Recent successes of other newspaper surveys.

Q. When you say recent successes of other newspapers you mean in terms of you selling them to other newspapers?

A. No, in terms of how the features ranked in reader polls.

Q. And did you sell exclusives to Calvin and Hobbs and Far Side to the Indianapolis Star previously?

A. No.

Q. In the Indianapolis area, did you sell Calvin and Hobbs and/or Far Side to anybody in the Indianapolis area?

A. No.

Q. But you did sell exclusives to the Indianapolis Star over some of your features in your inventory?

A. I did not.

Q. Who handled that?

A. My predecessor.

Q. Who is that?

A. Allen Stark.

Q. That is going back nine years though?

A. Yes.

Q. So the Indianapolis Star had exclusives from Universal that predated you?

A. Correct.

Q. Do you have any recollection of how many exclusives you had sold to the Indianapolis Star?

A. No.

Q. Now, something happened there in the last year or so with respect to exclusives?

A. Yes.

Q. What happened?

A. The territory of exclusivity was realigned.

Q. What was it before and then what was it after?

A. It was multiple counties prior and it has been pared back to the six contiguous counties around Indianapolis.

Q. And did that change remove Anderson from the Star's exclusivity territory?

A. I'm not sure.

Q. As a result of the change have you been able to sell features that were previously exclusive to the Star to other newspapers in that area?

A. Yes.

Q. Which papers have you sold to now that you didn't previously?

A. Frankfort.

Q. Anyone else?

A. That's all I can remember.

Q. As a result of that change have your commissions from the Indianapolis area increased?

A. Yes.

Q. Would that indicate then that Universal's fees from the Indianapolis area have increased as a result of the change?

MR. CARTER: I'm going to object to the—well, withdraw the objection. If he

knows. I was going to object to the form.

THE WITNESS: I can't say.

Q. (By Mr. Malysiak) Were you getting any commissions from the Indianapolis Star exclusives?

A. No.

Q. Have the contracts with the Star been redone because of this change?

A. No.

Q. Is the Star still paying the same weekly fees as previously?

A. Yes.

Q. Do you recall any of the features that you have sold to Frankfort that were previously exclusive to the Star?

A. No.

Q. Let me pace this off a second. The fees Universal is getting from the Star have remained the same?

A. Correct.

Q. But you have added fees from Frankfort that you didn't have previously?

A. Correct.

Q. So based upon that it would appear that Universal has gained more fees as a result

of the change?

A. Yes.

Q. No one wants Calvin and Hobbs in Indianapolis?

A. It's in place already.

Q. Where was it? With the Star?

A. I believe. There is two newspapers there.

Q. Did Frankfort buy Calvin and Hobbs?

A. Can't recall.

Q. How about Far Side?

A. Can't recall.

Q. Any other market where there has been a change from exclusive to nonexclusive?

A. Not that I can recall.

Q. Do you handle Dear Abby?

A. Yes.

Q. Is that one of your leading features?

A. Yes.

Q. That's an advice column. I suppose almost everybody knows that even me.

Who is your competition for Dear Abby?

A. Ann Landers.

Q. Do you have any other competitors with Dear Abby?

Q. Mr. Eberhart, where do you reside?

A. 322 Orenda Circle, Westfield, New Jersey 07090.

Q. Where do you work?

A. King Features Syndicate.

Q. What's your position there?

A. Director of operations.

Q. How long have you been with King Features?

A. Fifteen years.

Q. Prior to joining King Features 15 years ago, were you employed in any other job related to the newspaper industry?

A. Yes.

Q. If you could, from your earliest to the latest, just describe your employment history with respect to the newspaper industry.

A. I worked for United Press International from 1962 to 1979.

Q. Then you came to King from UPI?

A. Yes.

Q. What positions did you have at UPI over those years?

A. Reporter, editor, the last five years I

was managing editor.

Q. Could you also describe for me the positions you have had at King Features from the first one on?

A. I was hired as assistant sales manager, domestic, promoted to sales manager, and general sales manager worldwide, and then director of operations.

Q. How long were you assistant sales manager?

A. From 1979 to—I can't remember exactly. I am sorry.

Q. I understand. Then if you give me the parameters of the time you were sales manager up till about when?

A. About 1990 to about 1994.

Q. 1994?

A. 1993, sorry. Thanks.

Q. Then sales manager was—

A. That was general sales manager.

Q. Okay.

You have been director of operations since?

A. January 1, 1994. '3.

Q. '3?

THE WITNESS: Would you repeat the question, please?

Q. With respect to any feature that King has licensed to the Tribune during your time with King, do you know whether on any occasion that exclusivity has been removed or cancelled by King?

A. Not to my knowledge.

Q. How about with respect to the Sun-Times, any feature that's been licensed exclusively to the Sun-Times that's been cancelled, the exclusivity has been cancelled by King?

A. Not that I can recall.

MR. MALYSIAK: Please mark this one the next exhibit.

(Note from Paul Eberhart to Jean Randazzo marked Eberhart Exhibit 13 for identification as of this date.)

Q. Please look at what's been marked Eberhart Exhibit 13 and tell me if you can identify it.

A. I can identify it.

Q. What is it?

A. It's a note from me to Jean Randazzo, the clerk and keeper of the cards, to note on the records,

(Leeds)

Q. How do you determine what a market is, what the purpose is of whether you will sell to someone else in the same market or not?

A. Generally, our standard for a market is the county that a newspaper is published in, and any our counties where the newspaper circulates to 20 percent of the households in that county.

Q. In this instance, do you know whether the Chronicle has 20 percent penetration of the Oakland's County?

A. I do know that.

Q. What's the answer?

A. The Chronicle's circulation in Alameda County is below 20 percent of the households.

Q. There are other San Francisco area subscribers listed, for instance, the Livermore Herald, Santa Rosa Press Democrat, and the Walnut Creek Contra, C-o-n-t-r-a, Costa, C-o-s-t-a, Times.

Again, how does that fit into your policy?

A. You asked about Livermore?

Q. Santa Rosa.

A. Santa Rosa.

Q. And Walnut Creek.

A. Walnut Creek.

Q. Yeah.

A. In those counties the Chronicle does not have 20 percent of the penetration. In fact, the Chronicle has 20 percent penetration in only San Francisco County and San Rafael, Marin County.

Q. If the Chronicle increased its penetration level in—for instance, the county in which Santa Rosa is located, would that lead to—would that preclude the Santa Rosa Press Democrat from continuing as a subscriber?

A. No, it would not.

Q. Why is that?

A. We don't take the news service away from a newspaper unless they're misusing the service in some way or not paying for it.

Q. So you—at the time a subscription decision is made, you look at the 20 percent penetration factor and make a decision as to whether you can—you will license that newspaper?

A. Yes.

Q. And if that changes afterward in terms of another

Q. There are occasions when one newspaper that's a subscriber that has a 20 percent penetration level in a county will permit you to sell to another newspaper in that county?

A. Yes.

Q. Do you recall any instances of that since you've been in charge?

A. I can think of two. The Sacramento Bee in California. We asked them if they cared if we sold the news service to the college newspaper at the University of California, Davis, and the Sacramento Bee said it did not care. And I don't know the origins of this but arranged with my predecessors, The Charlotte Observer did not claim rights in the area of Rock Hill, South Carolina, where it has 20 percent.

Q. That was prior to your time?

A. They're waiving that—they're waiving that right, yes. That was prior to my time.

Q. Now if a paper waives the right, is it your policy to exceed to that waiver?

A. Yes.

Q. Why is that?

A. We think that if the paper minimizes the competition to the extent of telling us that they don't care that we sell to them, that they know the market and we think that they're correct on it.

Q. Do you know—strike that.

Was this 20 percent rule being used by your news service prior to your tenure?

A. Yes.

Q. Do you know how it came about that your news service followed this 20 percent rule?

A. No, I inherited it, I do not.

Q. Do you have any idea why it's 20 percent, not some other figure?

A. You'd have to have some objective standard somewhere, somehow, to contain newspapers' exuberance for our service, but why that exact number is used, I do not know.

Q. You never talked to anybody about why, why that number?

A. No.

Q. In applying that 20 percent rule, how do you determine whether another newspaper is within the county in

(WHEREUPON, the witness was sworn.)

JOSEPH J. LEONARD,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MALYSIAK:

Q. Please state your full name.

A. Joseph J. Leonard.

Q. Mr. Leonard, where do you live?

A. 25773 Apache Lane, Lake Barrington, Illinois, 60010.

Q. And where do you work?

A. Chicago Tribune.

Q. Where are your offices?

A. 435 North Michigan.

Q. What is your position there?

A. Associate editor.

Q. How long have you been with the Tribune?

A. With the Tribune Company, will be 38 years this October 26.

Q. So you began with them back in 1956?

A. 1956.

Q. Did you have any employment before the Tribune in a newspaper type job?

Q. What are your responsibilities as associate editor?

A. Basically all the logistics, technical, money, the business end of editorial, contracts, a lot of negotiating and even some content.

Q. By content what do you mean?

A. The area of special sections and the likes report in my division.

Q. Can you give me some examples of special sections?

A. Education Today, the town sections, you know, Wheaton, Oak Brook.

Q. Who do you report to?

A. The editor, Howard Tyner.

Q. And throughout your period as associate editor have you reported to whoever was the editor?

A. Correct.

Q. So early on that would have been Mr. Squires?

A. Would have been Mr. Squires. Would have been Mr. Tyner, Mr. Fuller, Mr. Squires.

Q. The sequence was Mr. Squires, Mr. Fuller and Mr. Tyner, is that correct?

A. Correct.

(Leonard) 86

needs.

Q. You have talked about a package and a mix. What do you view as the product that you are selling? Is it the newspaper as a whole?

A. The newspaper as a whole.

Q. You don't view yourself as selling, for instance, Parade magazine to the public?

A. No. I am selling the reader on Sunday probably a three pound package. Everything in there.

Q. And during the week the same thing with respect to your—

A. Not quite three pounds but still the total package.

Q. Do you view the features and the supplemental news service material as sort of ingredients to your product?

A. I don't know what you mean by ingredients. They are a part of the product. They are a very important part of the product. As our other competitors on TV and radio get news to people faster, the soft side of the business becomes more and more important.

Do you understand what I mean by soft

been in the business. It's just unspoken. It's there.

Q. What is it?

A. The 50-mile rule.

Q. When you came to the Tribune organization, do you know what practices there were with respect to exclusivity at the Tribune?

A. To the best of my knowledge, even as a copy boy, I heard about this 50-mile rule and that's when the town was a lot more competitive with big downtown newspapers than it is today.

Q. Do you know whether the exclusive was broader than 50 miles in earlier years?

A. I have never heard of anything broader than this 50-mile circle.

Q. Do you know how the exclusivity arrangement for the Tribune developed over time?

A. I don't know if it's an exclusive arrangement for the Tribune. I think it's an industry standard. That's my knowledge of it anyway.

Q. Do you know how the industry standard developed?

A. It was before my time.

(Leonard)

Q. When you say it's given or understood, what do you mean by that?

A. It's just if you are selling a package to me, I don't expect to see that package within 50 miles.

Q. And that is an understanding even if it's not spoken?

A. Even if it's not spoken.

Q. Do you have an understanding as to which papers are ones that qualify for the industry standard?

A. I think that is a part of negotiation on the paper. I mean I don't—I don't know what you mean by qualifying.

Q. Does the industry standard—

A. I was on the smallest paper in the city when I was on the Chicago American and we had it. If we bought it, it was there. And believe me, we were hanging on.

Q. What was the exclusivity provision for the American?

A. Best of my knowledge, the same 50-mile rule.

Q. When you yourself negotiate with

syndicators do you discuss exclusivity as a rule?

A. In recent time I only remember once where I had to—not where I had to. Where I did mention it.

Q. Where was that?

A. Parade.

Q. Why don't you discuss it on other occasions?

A. Because I have been used to dealing with the other syndicators and I know they understand the agreement.

Q. When you say it's an industry standard, what do you mean by that?

A. To me it's a standard. It's just there. It's like having safety glass in your car. I don't expect to find regular glass there. I mean it's just there. It's not something I even worry about.

Q. Do you believe there is an understanding throughout the newspaper industry that when a newspaper buys features or supplemental news services, it gets them on an exclusive basis within its market?

A. If that is how they negotiated in the

A. No, sir.

Q. Now, looking at this agreement under paragraph 1, it says, "Seller will provide New York Times News Service to the buyer without rights of exclusivity at the following price."

Did you have any discussions with Mr. Farnell or anybody else at the New York Times about that language?

A. Don't worry about it. Don't ever worry about it. It's the unspoken agreement.

Q. Is that what Mr. Farnell said?

A. I know it says that.

Q. You know it says without rights of exclusivity?

A. I know that when I signed this, I have got an—I have got it exclusively. I don't care what this says. I don't even bother changing it. It doesn't matter.

Q. Why is that?

A. Because I know that I have it exclusively. It's the way it's been done. It's the way it will be done.

Q. When you saw this agreement with this language, did you see that it said without rights

of exclusivity?

A. I probably read right over it, to be honest with you. It's just one of those things that doesn't matter, but I will find the agate wording in No. 2 on the second page that says derivative because that matters to me.

Q. What was that issue relating to?

A. That is the electronic rights and that is important to me because I have to have that. The other I know I have.

Q. Did you have any involvement in the process that resulted in the decision to raise the prices of the Tribune in 1992?

A. Say that again.

Q. Did you have any personal involvement in the decision to raise the Tribune's prices in 1992?

A. I was asked my opinion, but I wasn't at the decision level.

Q. Who asked you your opinion?

A. I believe Mr. Fuller was editor at the time.

Q. And he asked you?

A. Just in office conversation, what were my thoughts.

(WHEREUPON, the witness was sworn.)

JOHN F. LUX,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. MALYSIAK:

Q. Please state your full name.

A. John F. Lux.

Q. Where do you live, Mr. Lux?

A. I live in Wilmette.

Q. Where do you work?

A. I work at the Chicago Tribune.

Q. What is your position there?

A. I am now the on-line editor.

Q. That is the electronic news service of the Tribune?

A. That's correct.

Q. How long have you been in that position?

A. Since last—roughly since last October.

Q. How long have you been with the Tribune?

A. Since 1969, 25 years.

Q. Prior to that did you have any newspaper-related job?

A. Yes. I had worked at two other papers, at the Salt Lake Tribune and the Champaign-Urbana Courier.

Q. What jobs did you have at those papers?

A. I am a copy editor basically and I worked as a copy editor at those two papers and then came to the Tribune as a copy editor.

Q. Over your 25 years with the Tribune could you just describe what the different positions—

A. Sure. For the first five years I worked for Chicago Today, the afternoon tabloid. I was a copy editor, later served as the makeup editor of that paper.

I came to the Tribune when it—when that paper folded in 1974. I was an assistant makeup editor for about a year and a half, two years and I went to a copy desk. I ran overnight copy desk and then I ran the local and financial evening copy desk.

Went to features about—I am not really sure of the date. I didn't look all these up. But I went to features department where I ran the copy desk probably about 1978 or so when I went

into features. Then I was assistant Tempo editor. Then I edited the old Weekend section, which was the Friday section's predecessor, and was one of the founding editors of the Style section when it went to a tabloid format.

At that time I became an associate features editor and while supervising Style, I began to learn the syndicate part of the job under Colleen Dishon, who was the features editor at the time, associate editor of the paper actually.

Q. When did you become associate features editor?

A. This is roughly when we started the Style section, which I think was probably—it was about 1984, '85 I think roughly.

Q. How long did you stay in that position?

A. Actually, you know, I think they changed the titles. I think assistant features editor at first, then they changed to associate features editor but it didn't have much to do with my duties. Basically I am still at that level although I am the on-line editor, which is more of a descriptive term.

Q. At some point did you take over prime

responsibility for features?

A. Colleen Dishon kept the main responsibility for a few years after that as I learned. I didn't—I was the primary contact with the syndicates probably for about the last five years, ending in October roughly. Maybe a little bit longer. It's hard to tell.

Q. Over that five-year period that you just mentioned, which would be from roughly 1988 to 1993?

A. Yes, probably a little bit earlier than that. I was doing it too. But Colleen would still see some of the—like in terms of contracts and so forth, she would oversee contracts for the first couple years of that and then she would let—then kind of she let me do it on my own.

Q. So, for a few years anyway you were actually in charge of contracting for features for the Tribune?

A. Yes. That makes it sound like I could do it all by myself, which was not the case. But you know how a corporation works. I was certainly the main contact person.

Q. For that early period was Colleen Dishon

(Lux)

Colleen Dishon bought that.

Q. Do you negotiate the prices—did you negotiate the prices for features when you were features editor?

A. Yes.

Q. During those negotiations would you explicitly discuss a premium for exclusivity?

A. We went in with the idea that we were going to offer the top dollar in town because we wanted exclusive rights to our area. There was never any question of them offering us saying, well, look, I know you don't want to pay X dollars. If I sell this to four other papers I can give it to you. They didn't do that. It was never a question.

Q. There was never any formulation or calculation of what a premium would be for the exclusivity?

A. No.

Q. Was it your understanding that when you licensed a feature that license would continue until the Tribune chose to terminate it, assuming that it was still available for publication?

A. Well, the contract, of course, allows

either party to get out of it at a certain time. So, I would assume that if there was some reason for the syndicate to cancel it, they would have talked to us about it. It did not happen.

Q. During your time?

A. Yes. This was—we didn't have any Dallas type cases here.

Q. Where a syndicator took features from one newspaper in a market and took them to a different—

A. Extremely rare, as you must know.

Q. Was there any policy while you were in the features department over obtaining or backup features or comics you might not be using all the time but you'd want to have handy if you needed them?

A. Generally we had one backup comic, one very good backup comic for emergency use.

Q. I don't know if you have stayed familiar with the features area. You probably have. Is the current one Sherman's Lagoon?

A. Sherman's I notice they are running this week. Sherman's we have been running once a week in Kid News. I don't know if you read Kid News.

the Sun-Times at the time the expiration comes up?

MR. CONLON: Same objection.

BY THE WITNESS:

A. That would be doubtful.

BY MR. MALYSIAK:

Q. Why is that?

A. Just for standard business reasons, if somebody has purchased a product, they are paying for the product, they are fulfilling their end of the obligation, we would fulfill our end as well.

Q. So your policy would be that once, for instance, the Sun-Times licenses a feature and pays for it, they can have that feature as long as they continue to want it and pay for it on an exclusive basis?

A. Yes.

Q. Does that also hold for papers smaller than the Tribune and the Sun-Times in the Chicago market?

MR. CONLON: Well, same objection.

You can answer if you can.

BY MR. MALYSIAK:

Q. Let me make it more specific for you.

A. Yes. Sure.

corn grower in Peotone or something that has no news time element and is basically used to fill space. There are so many things that could fill the space, why should we run something that somebody might have already seen somewhere else?

Q. Do you have any responsibility for deciding what's used from Associated Press?

A. Not in my current job. Certain—I mean on a story-by-story basis, no. I have done it many times in all these years.

Q. Does the Tribune have any policy of preferring to use its own staff-generated material rather than Associated Press material?

A. That's eroding. I don't think that it's cost effective for us if the AP has already reported a story sufficiently to assign one of our people to redo their work.

But if there is an opportunity to add value by having our own reporting done, we certainly will.

Q. When you say it's eroding, you mean there was a policy at one time?

A. Never a policy. I think that in the era when there were four, six or eight newspapers in

Chicago, there was great—people placed great stock in having a maximum amount of staff-generated copy. But as I said, I don't think that that's a valid model any more.

Q. Why do you think it's not a model any more?

A. I think that it's preferable for—when we have purchased news from the New York Times or the AP or whoever, and we don't have a particular amount of expertise to add to it, it's more productive for us to have our people do things that nobody else is working on because the uniqueness of the Tribune is more important than our being covered for our own reasons of ego with bylines on stories.

Q. Are there occasions when the Tribune will find that it can choose among a Tribune staff piece, an Associated Press piece and a New York Times piece on the same day on basically the same topic?

A. Sure.

Q. Are there any guidelines as to how a decision is made as to which one or more of those would be used?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC., d/b/a THE DAILY HERALD,	)	
Plaintiff,	)	
v.	)	Civil Action No. 93 C 7493
CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,	)	Magistrate Judge Ronald A. Guzman Presiding Judge
Defendants.	)	

DECLARATION OF DENNIS A. BRITTON

1. I am Dennis A. Britton, Editor and Executive Vice-President of the Chicago Sun-Times newspaper (the Sun-Times). My business address is 401 North Wabash Avenue, Chicago, Illinois 60611. I have been employed at the Chicago Sun-Times since 1989.

2. The Sun-Times, which has been in circulation since 1941, is published daily and Sunday in Chicago by the Chicago Sun-Times, Inc., 401 North Wabash Avenue, Chicago, Illinois 60611.

The Sun-Times

3. The Audit Bureau of Circulations (ABC), 900 North Meacham Road, Schaumburg, Illinois 60195, is regarded in the newspaper business as the most authoritative source for circulation data and definitions. ABC measures newspaper circulation in relation to the newspaper's designated market, which is defined as the geographical area in which the newspaper provides primary editorial and advertising service.

4. The designated market for the Sun-Times includes Cook, Lake, DuPage, Kane, McHenry, and Will counties in Illinois and Lake and Porter counties in Indiana. This designated market reflects the broad geographical area in which the Sun-Times has its most important presence.

5. The Sun-Times' main competitor, both in the Chicago-metropolitan area and the outlying suburban counties, is the Chicago Tribune. There are several other newspapers circulated in the Sun-Times' designated market, including the Daily Herald.

6. The Sun-Times has the second largest circulation of any newspaper in the Chicago metropolitan area. The latest annual ABC figures for the Sun-Times (for the 52 weeks ending March 28, 1993) show average paid circulation in its designated market of 528,940 weekdays and 527,648 Sunday. (Copy of ABC report at Exhibit A) Since 1985, when the Daily Herald entered the market, the Sun-Times circulation has decreased by approximately 100,000 (or 17%) on weekdays (from 628,000 to 528,000) and by 139,000 (or 21%) for Sunday editions. (Copy of ABC report at Exhibit B)

7. The Sun-Times' future success depends a great deal on its ability to compete throughout the metropolitan

Chicago area. To ensure that success, it is imperative that the Sun-Times maintains and builds on its posture as a viable regional newspaper, serving both suburban and metropolitan Chicago. Because news is something of a universal commodity available to all, the Sun-Times must set itself apart and preserve its reputation by providing a quality product, and by offering an exclusive and unique package of news, columns, features, cartoons and other information. It is the exclusivity that guides the readers' buying decisions and breeds loyalty to the Sun-Times.

8. Timeliness and limited demand shape the value of newspapers, which makes exclusive licensing agreements essential to the Sun-Times. Indeed, these agreements are a custom in the industry—having been used in the newspaper business for over 30 years. Nevertheless, exclusively licensed material comprises only a portion of the magnitude of material available to newspapers.

9. The Sun-Times has made special efforts to attract readers in the suburban Chicago market. For instance, over the past few years, the Sun-Times has targeted the suburban population by providing free newspaper subscriptions for limited time periods, reduced rates, and a "new mover program" for suburban movers.

The Los Angeles Times-Washington Post News Service

10. The Sun-Times is a subscriber to the general News Service sold by the Los Angeles Times-Washington Post News Service, Inc. (LAT-WP). The Sun-Times uses the LAT-WP News Service as a source for news stories and feature articles to supplement the paper's own reporting,

and the materials obtained from AP and other services. The LAT-WP is an important supplemental source of international and national news, particularly news stories with an analytical perspective. The News Services provides the Sun-Times with valuable lifestyle articles and similar features.

11. The Sun-Times' exclusive rights to the LAT-WP News Service is important to foster the unique and comprehensive nature of the Sun-Times as a metropolitan newspaper.

12. The statements set forth above are made on my own personal knowledge and upon information provided by individuals reporting to me at the Sun-Times.

13. I declare under penalty of perjury that the foregoing is true and correct.

s/ Dennis A. Britton
Dennis A. Britton

SUBSCRIBED and SWORN to
before me this 10th day
of March 1994.

s/Joanie R. Harris
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PADDOCK PUBLICATIONS, INC. d/b/a THE DAILY HERALD,	)	No. 93 C 7493
Plaintiff,	)	Judge John A. Nordberg
v.	)	Magistrate Judge Ronald A. Guzman
CHICAGO TRIBUNE COMPANY, et al.,	)	
Defendants.	)	

DECLARATION OF JOSEPH J. LEONARD

I, Joseph J. Leonard, state as follows:

1. I an employed by defendant Chicago Tribune Company as Associate Editor of the *Chicago Tribune*. I joined the Chicago Tribune Company in 1956.

2. As part of my duties I am responsible for, among other things, the business affairs of the *Chicago Tribune* editorial department, including purchasing syndicated features and supplemental news services that appear in the paper. I have personal knowledge of the matters set forth in this declaration which I am submitting in support of the defendants' motion to dismiss, or in the alternative, for summary judgment.

3. The *Chicago Tribune* has been published in Chicago since 1847. The *Chicago Tribune's* editorial staff includes 238 reporters and writers. *Chicago Tribune* operates five news bureaus across the United States as well as nine international bureaus. *Chicago Tribune* also operates more than one dozen news bureaus throughout

the Chicagoland area each staffed by between one and twenty-two employees.

4. In addition to the material created by its own staff, the *Chicago Tribune* subscribes to syndicated features and to supplemental news services.

5. The syndicated features to which the *Chicago Tribune* subscribes are of three general types: comic strips, columns, and editorial cartoons. Comic strips have appeared regularly in the *Chicago Tribune* since 1917 as an aid to increasing newspaper circulation and reader loyalty. The *Chicago Tribune* hired several staff artists to create comic strips such as "Gasoline Alley", "Annie", and "Dick Tracy", and in 1933 incorporated the national newspaper syndicate now known as Tribune Media Services, Inc.

6. The comic strips that the *Chicago Tribune* currently subscribes to include, among others:

Amazing Spiderman
Baby Blues
Beetle Bailey
Blondie
Brenda Starr, Reporter
Broom Hilda
The Buckets
Callahan
Calvin & Hobbes
Cathy
Dave
Dick Tracy
Dilbert
Doonesbury
The Far Side
For Better or For Worse

Fox Trot
Hagar the Horrible
Hi and Lois
Making It
Mister Boffo
Mother Goose & Grimm
Peanuts
Sherman's Lagoon
Shoe
Winnie Winkle

The *Chicago Tribune* currently subscribes to a number of editorial cartoons as well.

7. *Tribune* staff create columns for the paper, including Mike Royko, Clarence Page, and Bob Verdi, among others. Syndicated columns are also used in the *Chicago Tribune* to supplement the columns created by the *Tribune* staff. A few of the syndicated columns currently appearing in the paper are: Anna Quindlen, William Raspberry, George Will, "Linda Black's Horoscope", and "Miss Manners". Like comic strips, syndicated columns are used as an aid to circulation.

8. The *Chicago Tribune* also subscribes to several supplemental news services, including Reuters, the New York Times News Service, Agence France-Presse, Entertainment News Service, Religious News Service, State News Service, Scripps Howard News Service, Knight-Ridder Tribune News Service, Money Magazine, Kiplinger Magazine, American Health Service, Tribune Media Services, and Primary Color. The *Tribune*'s purpose in subscribing to supplemental news services is to provide comprehensive and balanced coverage of national and international news.

9. There are hundreds of syndicated features available to newspapers and in fact, the *Chicago Tribune* is offered many of these materials. Each year, *Editor and Publisher* magazine publishes its Syndicate Directory which lists many of the syndicated features and supplemental news services that are available to newspapers like the *Tribune*. A copy of the Syndicate Directory Section for 1993 is attached as Exhibit A.

10. The *Chicago Tribune* has distinguished itself by the features and supplemental news services that it includes in the newspaper. I believe that our selection of columns, other features, and news items are an important reason that our readers select our newspaper over our competitors.

11. Exclusivity with respect to the *Chicago Tribune's* features and supplemental news services is important because the newspaper's selection of such material is intended to reflect its character, its philosophy, and its judgment about what is important. Readers base their purchase decisions in part on whether a newspaper reflects their own character, interests, and judgment; in obtaining exclusivity, the *Tribune* prevents competitors from benefitting from its research and its judgment by merely mimicking the *Tribune*'s editing decisions. We are willing to pay a premium for exclusivity because of the way in which our selections complement one another and help us to retain our customers. In addition, because materials lose their value after their initial publication in a given market, the *Tribune*'s obtaining of first rights insures that we get the benefit of our judgments before any of our competitors. Exclusivity with respect to features and supplemental news services is common and indeed, customary, within the industry.

12. The Chicago newspaper market is a highly competitive one. In fact, Chicago, along with New York City and Houston, is one of the few remaining major metropolitan areas with two or more daily newspapers published by competing companies.

13. Print competitors of the *Chicago Tribune* include *Chicago Sun-Times, USA Today, The New York Times, The Wall Street Journal, Daily Herald, Daily Southtown, Chicago Defender, La Raza, Northwest Herald, DeKalb Chronicle, Courier-News, The News-Sun, Herald-News, The Gary Post-Tribune, The Times* (of Lake County, Indiana), and *Aurora Beacon-News,* all of which are published daily in the Chicagoland area. In addition, the *Chicago Tribune* competes for advertising revenues with direct mail marketers, broadcast and cable television, radio, cable, magazines, and outdoor sign companies.

14. We rely on reports from the Audit Bureau of Circulations to determine how the newspaper is selling within the market. The Audit Bureau of Circulation in an independent auditing and reporting firm that reports a newspapers gross and paid circulation within its designated market and in total. The ABC Reports, as they are called, are published once a year and provide average paid circulation in the counties, municipalities, and zip codes in which a newspaper is offered for sale, as well as total circulation numbers.

15. According to the ABC Reports, the market designated by the *Daily Herald* since 1985 has included only parts of Cook, DuPage, and Lake counties and excludes the city of Chicago. In its ABC Report released in June 1993, the *Daily Herald* identified several zip codes in Kane, McHenry, and Will counties as part of its desig-

nated market. Since at least 1985, the *Chicago Tribune*'s designated market has consisted of Cook, DuPage, Lake, Kane, McHenry, and Will counties in Illinois and Lake and Porter counties in Indiana.

16. Over the past twenty years there has been a general decline in daily newspaper readership in the Chicagoland area. Since 1985, despite the *Tribune*'s best efforts, the circulation growth of the *Chicago Tribune* has fallen somewhat. For example, in 1985 its daily circulation within its designated market (referred to as "total newspaper designated market" on the ABC Reports) was 683,892 with Sunday circulation at 1,012,779. By 1993, daily circulation had decreased by almost 9% to 622,469 and Sunday circulation had decreased by almost 3% to 984,422. Copies of the ABC Reports from which these figures are derived are attached Exhibit B.

17. The *Daily Herald* has been a competitor of the *Chicago Tribune* for many years. The *Daily Herald* has, over time, increased its coverage of national news stories. It is now available to readers in Chicagoland through home delivery, and at newsstands and newsracks in downtown Chicago and at O'Hare Airport.

18. I caused a review of the ABC Reports for the *Daily* Herald for the period from 1985 to the present to be made. Since 1985, the total circulation for the *Daily Herald* has risen steadily. For example, in 1985 its total daily circulation (referred to as "total paid" or "total average paid" circulation on the ABC Reports) was 65,859 and its Sunday total circulation was 64,278. By 1993, its total daily circulation had increased approximately 84% to 121,424 and its total Sunday circulation had increased almost 84% to 118,220. Copies of the

relevant reports as well as a bar graph showing the increases in circulation for the *Daily Herald* within its designated market are attached as Exhibits C and D.

19. Based upon a review that I caused to be conducted of the *Daily Herald* for the eight day period of January 1 through January 8. 1994, we determined that the following features and news services, which are syndicated, appeared:

COMICS, CARTOONS, AND PUZZLES

Feature	Syndicator
Frank and Ernest	Newspaper Enterprise Association (division of United Media)
Born Loser	"
Berry's World	"
Robotman	"
Arlo and Janis	"
Ed Stein editorial cartoon	"
Winthrop	"
Grizzwells	"
Beattie Boulevard	"
Kit 'N Carlyle	"
Horoscope	"
Bridge column	"
Daily crossword puzzle	"
Rose is Rose	United Features (division of United Media)
Tarzan	"
Big Nate	"
Dilbert	"
Betty	"

Ask Shagg	"
Prof. Yuk-Yuk	"
Uncle Art's Funland	"
Motley's Crew	Tribune Media Services
Animal Crackers	"
Sally Forth	King Features
Redeye	"
Cryptoquote	"
Judge Parker	North American Syndicate (division of King Features)
Mark Trail	"
Single Slices	Los Angeles Times Syndicate
Outland	Washington Post Writers Group
Sunday crossword puzzle	New York Times

TEXT FEATURES

Mark Russell	Los Angeles Times News Services
Cal Thomas	"
Rita St. Clair	"
Hand Around the House	"
James Flanigan	"
Single File	"
Suzanne Fields	"

Liz Smith	"
Jimmy Breslin	"
Art Buchwald	"
Erma Bombeck	Universal Press Syndicate
Georgie Anne Geyer	"
Scott Burns	"
Brendan Boyd	"
David Broder	Washington Post Writers Group
George Will	"
Book Reviews	"
Ellen Goodman	"
Neal Pierce	"
Jane Bryant Quinn	"
Ken Harney on Housing	"
Richard Cohen	"
Charles Krauthammer	"
Lou Cannon	"
Turf charts and results	"
"Today's Line"	"
USA Weekend	"
Shelby Lyman Chess	"
"Olga Knows" Horoscope	"
Miss Manners	United Features Syndicate
Soap Updates (Johnson)	"

William Rusher	NEA
Chuck Stone	"
Ask Anne and Nan	"
Dr. Ruth	King Features Syndicate
Child Life	"
Lewis Grizzard	Cowles (division of King Features Syndicate)
David Myers Real Estate	"
Eunice Farmer Sewing	"
Al Carrell	"
Dr. Lawrence Lamb	"
Solis-Cohen Antiques	Self
Handy Ma'am	Sisters Syndicate
Roger Simon	Creators Syndicate
Percy Ross	"
Paul Harvey	"
Patrick Buchanan	Tribune Media Services
Andy Rooney	"
Bard Lindeman	"
At Home With Technology	RMS Syndication
Norma Schonwetter Micro Magic	Nasco Products

WIRE SERVICES

Associated Press

SUPPLEMENTAL NEWS SERVICES

Reuters

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 11, 1994

s/Joseph J. Leonard
Joseph J. Leonard

CHICAGO TRIBUNE NEWS SERVICES

Cumulative Totals

October 1, 1994-September 30, 1995 (365 Days)

	Tribune Staff or Specials		Trib. Wires		AP		Reuters		NYT	
Sec. 1	3,515	(9.60)	3,621	(9.90)	2,482	(6.80)	654	(1.80)	476	(1.30)
Op. Ed.	-	(-)	-	(-)	-	(-)	-	(-)	80	(0.20)
Bus.	1,344	(3.70)	329	(1.00)	253	(0.70)	213	(0.60)	73	(0.20)
Obit.	583	(1.60)	29	(0.10)	260	(0.70)	37	(0.10)	150	(0.40)
TOTAL	5,442	(15.00)	3,979	(10.90)	2,995	(8.20)	904	(2.50)	779	(2.10)

	S-H		Other	
Sec. 1	17	(. 0)	123	(0.30)
Op. Ed.	-	(-)	-	(-)
Bus.	3	(. 0)	206	(0.60)
Obit.	0	(. 0)	2	(. 0)
TOTAL	20	(0.10)	331	(0.90)

( ) - Daily Average

AP - Associated Press
NYT - New York Times News Service
S-H - Scripps-Howard News Service

address for the record, please?

THE WITNESS: John C. Brewer.

Home, 1204 Main Street, Peekskill, New York.

EXAMINATION BY MR. MALYSIAK:

Q. Mr. Brewer, where are you employed?

A. I'm at The New York Times Syndication Sales Corporation.

Q. What's your position there?

A. I'm president and editor-in-chief.

Q. How long have you been with The New York Times Syndication Sales?

A. Since 1988.

Q. Have you been in the same position throughout that period?

A. No, I began with the Times as the executive editor of the News Service from 1988. In 1989 I became executive vice-president, and in 1990 I became president.

Q. Would you go through each of your positions here and describe what your responsibilities were?

A. Each of my positions?

Q. Since you've been with New York Syndication Sales?

A. In 1988 I was executive editor of the News Service. I was responsible for the—well, New York Times News Service, its production and distribution.

As executive vice-president of the Syndication Sales Corp. which is the parent company of The New York Times Syndicate and The New York Times News Service, I was basically the chief executive officer and the president. We didn't have a president at that point. And at present I am the chief executive officer.

Q. Have your responsibilities, in fact, changed since you became president from when you were executive vice-president?

A. No, not really.

Q. Is The New York Times News Service separately incorporated?

A. No.

Q. It's owned by The New York Times Syndication Sales Corporation?

A. That's correct.

Q. Who owns The New York Times Syndication Sales Corporation?

A. New York Times Company.

Q. On average how many items will appear on the News Service on a given day?

A. About 200.

Q. That includes what types of pieces?

A. Well, all kinds. Feature stories, news stories, sports stories, business stories. A variety.

Q. Is there—

MR. MAYERS: Excuse me.

Q. —on the average, how many of the 200 items would originate in The New York Times?

A. About 150 of them.

Q. Since you've been with the company has there been any change in the number of items that appear on the News Service on a given day on the average?

A. In that we did not have as many contributors, we've added those since 1988.

Q. So that the number of items appearing daily has gone up?

A. Yes, that's correct.

Q. What was the average, if you recall, when you came on?

A. I think it was actually more, like when I first came I think we had 100. And that reflects the

request?

A. The Daily Herald is, the paper that I know of certainly is a Chicago newspaper, circulates within the Chicago market. In that instance, it comes under our business practice trying to sell to only one newspaper in a market. Again, this maximizes our value.

Q. Did you actually do any sort of market study to determine whether you should sell to The Daily Herald or not?

A. I think we certainly know it in general terms that they are part of the Chicago market. I'm not aware of them claiming otherwise.

Q. In there any fee that The Daily Herald would agree to pay that would cause you to change your mind and allow The Daily Herald to be a subscriber?

A. I don't think so.

Q. Why is that?

A. Again, we're back to our policies of this in trying to sell to only one newspaper in the market. And it really maximizes the value of the material more than selling to anyone that came in.

Q. If you determine that The Daily Herald would make greater use of your News Service in terms

No. 96-1669

Supreme Court, U.S.
FILED
MAY 16 1997
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PADDOCK PUBLICATIONS, INC.,
Petitioner,
v.

CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that Petitioner's failure to allege antitrust injury required dismissal of its complaint.

2. Whether the decision by the court of appeals is consistent with this Court's precedents and with the decisions of other circuits.

3. Whether the court of appeals correctly held that this Court's decision in *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953), is inapplicable to the facts of this case and, even if applied, would not have condemned the restraints challenged below.

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 the parents and subsidiaries (except wholly owned subsidiaries) of the respondents are as follows:

The parent companies of the Los Angeles Times/ Washington Post News Service, Inc. are The Times Mirror Company (50%) and The Washington Post Company (50%). The parent company of the New York Times Syndication Sales Corporation is The New York Times Company. The parent company of Chicago Tribune Company and Tribune Media Services, Inc. is the Tribune Company. The parent company of the Chicago Sun-Times, Inc. is Hollinger International, Inc. United Media is a name under which United Feature Syndicate Inc. and the Newspaper Enterprise Association do business. The E. W. Scripps Company is the ultimate parent of United Feature Syndicate Inc. and the Newspaper Enterprise Association. The parent company of King Features Syndicate, Inc. is the Hearst Corporation. Respondents The Times Mirror Company d/b/a Los Angeles Times Syndicate and Creators Syndicate have no parent companies. None of the respondents has a subsidiary that is not wholly owned.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1669

PADDOCK PUBLICATIONS, INC.,
Petitioner,

v.

CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC., TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT

Petitioner Paddock, Inc. ("Paddock") publishes the *Daily Herald,* a general interest newspaper serving the Chicago metropolitan area. (P. App. 96.)[1] Respondents are the publishers of two other Chicago daily newspapers (the *Tribune* and the *Sun-Times*), two suppliers of supple-

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[1] P. App. refers to the appendix filed with Paddock's petition.

mental news services[2] and five suppliers of syndicated features and comics.[3] Pursuant to contract, the news services, NYTNS and LAT/WP, provide their copyrighted materials to the *Tribune* and the *Sun-Times* respectively on an exclusive basis. Each of the newspapers also has individual contracts with each of the remaining respondents to publish syndicated features and comics on an exclusive basis in the Chicago area.[4]

Paddock alleged below that the licenses granted to the *Tribune* and *Sun-Times* by the supplemental-news-service and syndicator defendants (collectively referred to hereafter as the supplier defendants) restrain trade in violation of Sherman Act § 1 because the *Daily Herald* is thereby denied access to these materials. (P. App. 109-110). As a result of this "accumulation of rights by the *Tribune* and the *Sun-Times*," Paddock contended that the *Daily Herald* had been restrained in competing with the *Tribune* and the *Sun-Times* and in expanding its areas of circulation. (P. App. 111). While Paddock acknowledged the availability of supplemental news services and syndicated features not licensed to the *Tribune* or the *Sun-Times*, it contended that those services were all either "available to all newspapers on a non-exclusive basis" or were not sufficiently "popular" to serve as "reasonably effective substitutes." (P. App. 109-10).

The complaint did not allege horizontal collusion between any of the supplier defendants or between the

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[2] The New York Times News Service (NYTNS) and the Los Angeles Times/Washington Post News Service (LAT/WP).

[3] Tribune Media Services, Inc., Creators Syndicate, King Feature Syndicate, Inc., The Times Mirror Company d/b/a Los Angeles Times Syndicate, United Media and Universal Press Syndicate ("the syndicator defendants").

[4] The *Daily Herald* similarly contracts with various of the syndicator defendants and publishes features licensed by them. (Pet. 21 n.4; P. App. 105.)

Sun-Times and the *Tribune*. It also did not allege market or monopoly power with respect to any of the supplier defendants.

Respondents promptly filed a motion to dismiss the complaint. The Magistrate Judge subsequently issued a Report and Recommendation that the motion be granted, concluding that absent allegations of monopoly power or collusion among any of the defendants, Paddock's claim that the exclusive licenses collectively deny it access to material essential to its ability to compete did not state an antitrust violation. (P. App. 59-60.)

The District Court accepted the Magistrate Judge's recommendations and adopted his conclusion that Paddock's complaint did not state a claim under section 1 because it failed to allege a cognizable injury to competition, as the Rule of Reason requires. (P. App. 68-69.) The court rejected Paddock's argument that the individual effects of the challenged licenses could be aggregated to establish the necessary antitrust injury. (P. App. 72-83.)

The District Court granted Paddock leave to amend, and Paddock filed a second complaint. (P. App. 115.) Concluding that the amended complaint merely repackaged the allegations of the initial complaint and still depended on the theory that the effects of the individual licenses could be aggregated for purposes of stating an injury to competition, the District Court again dismissed Paddock's claims. (P. App. 91-92.)

Paddock appealed the dismissal to the Seventh Circuit. As required by Fed. R. Civ. P. 12(b)(6), the Court of Appeals assumed the facts alleged in the complaint to be true, but nevertheless concurred in the District Court's conclusion that Paddock had failed to state a claim under section 1. It determined that Paddock's allegations fundamentally constituted "an 'essential facilities' claim—but without any essential facility," noting that the com-

plaint conceded that there were multiple, competing facilities to which the *Daily Herald* was seeking access and that no potential for monopoly existed at either the upstream or downstream level of production. (P. App. 5.)

Aligning itself with other courts that have considered challenges to exclusive copyright licenses, the Seventh Circuit concluded that, far from harming competition in any relevant market, the contracts at issue serve pro-competitive purposes, such as ensuring consumer access to a greater diversity of news stories, opinions and features. (P. App. 6.) The Seventh Circuit also affirmed the District Court's holding that the licenses constitute a form of exclusive distributorship with different effects on competition than the arrangements in the exclusive dealing precedents on which Paddock relied. (P. App. 9.) It further concluded that the licenses would be upheld, in any event, since the shortness of their terms offers Paddock ample opportunity to compete for the licensed materials. (P. App. 11-12.)

In view of Paddock's failure to allege any injury to competition, as required as a threshold matter in all Rule of Reason cases, the Seventh Circuit upheld the District Court's dismissal of the complaint. (P. App. 12.)

On January 21, 1997, by a unanimous vote, the Court of Appeals denied Paddock's petition for a rehearing. (P. App. 13.)

ARGUMENT

I. BOTH THE SEVENTH CIRCUIT AND THE DISTRICT COURT BELOW PROPERLY APPLIED THE RULE OF REASON IN DISMISSING PADDOCK'S COMPLAINT

Paddock broadly claims that the Seventh Circuit has adopted a "per se rule of legality" for all vertical arrangements. (Pet. 6-7.) As the discussion below explains, however, Paddock's dramatic assertion has no basis in

fact. Its complaint was dismissed (and that dismissal upheld), as the Rule of Reason requires, simply because it failed to allege any cognizable anticompetitive effects from the exclusive licenses at issue. Contrary to Paddock's contentions, this outcome is entirely consistent with the decisions of this Court and those of the other federal circuits.

This Court has recognized that vertical restraints "allow[] manufacturer[s] to achieve certain efficiencies in the distribution of [their] products," that may benefit consumers through increased interbrand competition.[5] With respect to exclusive distributorships in particular, it has indicated that, absent a showing that alternative supplies are not available, a manufacturer's decision to sell its products to only one outlet in a region does not offend the antitrust laws.[6] Accordingly, lower courts applying the Rule of Reason in exclusive distributorship or analogous cases [7] have routinely required, as the Seventh Circuit

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[5] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977). Interbrand competition is "competition among the manufacturers [or suppliers] of the same generic product." Intrabrand competition is competition among distributors "of the product of a particular manufacturer [or supplier]." *Id.* at 52 n.19.

[6] *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967); *see also GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 997 (9th Cir. 1976) ("[t]here is a veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant . . . an exclusive franchise"), *aff'd*, 433 U.S. 36 (1977).

[7] As the Seventh Circuit recognized, the individual licenses Paddock challenges are a form of exclusive distributorship, in which various suppliers have committed to provide their copyrighted materials to only one customer within a designated geographic area. (P. App. 9.) That finding is consistent with the way other courts have treated exclusive licenses of intellectual property in the context of a section 1 challenge. *Woodbury Daily Times Co. v. Los Angeles Time-Washington Post News Service*, 616 F. Supp. 502, 506 (D.N.J. 1985) (case also involving regional newspaper's section 1 challenge to larger paper's exclusive subscription to a supple-

did here, that the plaintiff allege and prove an injury to competition in the market as a whole (*i.e.*, to interbrand competition) in order to state a claim under section 1.[8]

The dismissal of Paddock's claim was based entirely upon its failure to meet this requirement, and not upon the application of any per se rule of legality for vertical restraints. According to Paddock, the source of antitrust injury in this case is its inability, by virtue of the exclusive licenses, to obtain access to the "best" syndicated news services and the "most popular" comics and features. (P. App. 123, 127-128, 133.) In an attempt to state an injury broader than merely the damage to its own competitive prospects, Paddock also alleged that the chal-

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mental news service; court determined that "[t]his case presents a situation of exclusive dealership" and examined restraint's effect on interbrand competition), *aff'd mem.*, 791 F.2d 924 (3d Cir. 1986); *United States v. Chicago Tribune-New York News Syndicate, Inc.*, 309 F. Supp. 1301, 1307 (S.D.N.Y. 1970) (characterizing Tribune's exclusive license to syndicated features as an "exclusive dealership"). *See also* VIII Phillip E. Areeda, *Antitrust Law*, ¶¶ 1655a, 1655b at 606-07 (1989) (likening agreements that provide that a movie will be "exhibited in only one place at a time within a local market" or that "comic strips and syndicated columns [will be] printed in only one local newspaper" to "a manufacturer['s] appoint[ment of]a single dealer for a local market or even for the entire distribution of his product").

[8] *See* 1 Theodore L. Banks, *Distribution Law: Antitrust Principles and Practice* § 4.7.3 at 782-83 (1993) ("[s]ince *Sylvania*, the test of the legality of an exclusive distribution arrangement . . . has been the impact on interbrand competition": "[t]he mere fact that one dealer does not have the opportunity to purchase a product due to the presence of an exclusive arrangement does not state a situation of antitrust injury") (citing *Great Escape, Inc. v. Union City Body, Inc.*, 791 F.2d 532 (7th Cir. 1986)); *accord Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987); *Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351, 355 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); *Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc.*, 812 F. Supp. 387, 392 (S.D.N.Y. 1993).

lenged restraints harm consumers by denying them the choice of alternative outlets in which to read the same stories and features that now appear only in the *Tribune* and the *Sun Times.* (P. App. 135.) But such allegations do not describe the kind of harm to competition that the antitrust laws were designed to prevent.

As the Seventh Circuit properly recognized, Paddock's theory of antitrust injury "is fundamentally an 'essential facilities' claim—but without an essential facility."[9] The sine qua non of such a claim is a single bottleneck facility that cannot reasonably or practically be duplicated by the plaintiff and which creates the potential for the monopoly in the supply market to be extended downstream.[10] However, Paddock's allegations on their face reveal that in this case competition exists at both levels of production (*i.e.*, among suppliers of copyrighted materials and among newspapers) and that there are at least three rival "facilities" for each type of material (*i.e.*, supplemental news services and features) that Paddock asserts is "vital" to its ability to compete.[11] As the Seventh Circuit rightly determined, those facts effectively preclude a finding of an essential facility here and eliminate any basis for inferring that the multiple exclusive licenses at issue have caused injury to anyone other than Paddock.[12]

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[9] P. App. 5. *See also* Paddock's Amended Complaint, P. App. 124 (alleging that "[a]ccess to at least one of [the defendant supplemental news] services is essential to enable the *Daily Herald* . . . to compete effectively with the *Tribune* and the *Sun-Time* in the sale of general interest newspapers in the Chicago Area Market").

[10] *See* P. App. 5 (distinguishing the facts here from those in *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912)).

[11] P. App. 5 (observing that "[t]here are three supplemental news services that the *Herald* is willing to acknowledge as major competitors (and others besides, though the *Herald* denigrates them)" and "hundreds, if not thousands of opinion and entertainment features").

[12] P. App. 5 (citing *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024 (7th Cir.), *cert. denied*, 488 U.S. 909

Moreover, with respect to the licenses' impact on interbrand competition, which this Court has emphasized "is the primary concern of antitrust law," [13] the Seventh Circuit was able to discern only procompetitive effects. First, contrary to Paddock's assertion that the licenses "provide no benefits to consumers" (Pet. 3), the Court pointed out that by helping Chicago dailies to differentiate themselves, exclusive stories stimulate greater internewspaper competition and ensure that readers will be offered a wider selection of articles and features.[14] Second, it noted that by permitting intellectual property owners to maximize the value of their products, exclusive licensing arrangements create incentives for writers and artists to produce more copyrighted material. (P. App. 6.)

Finally, far from declaring all vertical restraints to be per se legal, the Seventh Circuit observed that the supplier defendants' practices could harm consumers if they facilitated "tacit collusion." [15] However, the Court noted that in this case the extremely unconcentrated nature of the

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(1988)). In *Flip Side*, the plaintiff concert promoter alleged that two of its competitors (JAM and Tempo) had violated section 1 by entering into an exclusive agreement to present concerts at a particular facility for which it alleged the only adequate substitute was unavailable as a result of an exclusive agreement with a third party. Flip Side contended that its inability to obtain rights to any comparable desirable facility established the necessary anticompetitive harm. The Seventh Circuit affirmed the district court's ruling for the defendants, concluding that "absent collusion between JAM and Tempo, . . . Flip Side had failed to demonstrate an antitrust injury." *Id.* 1034.

[13] *Sylvania*, 433 U.S. at 52 n.19; *see also Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 724 (1988).

[14] P. App. 6 (noting that "[a] market in which every newspaper carried the same stories, columns, and cartoons would be a less vigorous market than the existing one.")

[15] P. App. 6 ("[t]acit collusion (economists' term for 'shared monopoly') could be a source of monopoly profits and injury to consumers even if none of the stages of production is monopolized").

supply market made such a danger remote and added that, in any event, Paddock had not alleged that the exclusive licenses had caused this sort of injury. (P. App. 7.)

In view of these findings, the Seventh Circuit affirmed the district court's decision dismissing the complaint. Given Paddock's failure to allege a cognizable anticompetitive effect from the licenses, the District Court and the Seventh Circuit were not obliged to inquire further into the "reasonableness" of the challenged restraints.[16] Paddock's loss of opportunity to try its claims on the merits is due simply to its own failure to make the threshold showing of antitrust injury required in all non-per se cases, and not to any jettisoning of the Rule of Reason by the Seventh Circuit.

II. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE DECISIONS OF OTHER CIRCUITS

Having asserted the fallacy that the Seventh Circuit adopted a per se rule of legality for all vertical restraints, Paddock argues that this Court should grant certiorari to address the conflict that purportedly has now been created with its decisions and with the decisions of other circuits. As explained above, that argument is specious, since the Seventh Circuit made no such ruling. On the contrary, the Seventh Circuit's decision is entirely consistent with the antitrust principles applied by this Court and courts in other federal circuits to non-price vertical arrangements like the exclusive licenses at issue here.

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[16] *See Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1087 (7th Cir. 1992) (explaining that "[s]ince the district judge's decision was based on [the plaintiff's] failure to allege an anticompetitive effect on an identifiable market, the argument that the court improperly determined that the [challenged restraints] were reasonable on a motion to dismiss is without merit"), *cert. denied*, 508 U.S. 908 (1993).

As this Court has repeatedly emphasized, the antitrust laws are designed to protect competition, not competitors.[17] Any plaintiff asserting a Rule of Reason violation is required as a threshold matter to allege an injury to competition in the market generally, rather than simply to itself. This requirement is particularly important in the case of non-price vertical restraints, because of what this Court has recognized is their "real potential to stimulate interbrand competition."[18] Paddock's allegation that the exclusive licenses deprived it of access to the best news services and most popular comics failed to describe the requisite injury to consumer welfare. The Seventh Circuit thus properly held that Paddock was not entitled to proceed with its case.

Numerous other courts faced with claims analogous to Paddock's have come to the same conclusion, although no such citations appear in the petition for certiorari.[19]

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[17] *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

[18] *See Business Elec.*, 485 U.S. at 724 (citing *Sylvania*, 433 U.S. at 52 n.19).

[19] *See, e.g., Futurevision Cable Sys. of Wiggins v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 770 (S.W. Miss. 1992) (granting motion to dismiss challenge to exclusive arrangement between program provider and cable operator; it was apparent from the face of the complaint that the plaintiff had found alternative, though less popular, sources of programming and that the exclusive licenses had enhanced, rather than harmed interbrand competition), *aff'd mem.*, 986 F.2d 1418 (5th Cir. 1993). *See also TV Communications Network, Inc. v. Turner Network Television*, 964 F.2d 1022 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Theee Movies of Tarzana v. Pacific Theatres, Inc.*, 828 F.2d 1395, 1400 (9th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 766 F.2d 1216 (10th Cir. 1986), *cert. denied*, 496 U.S. 1005 (1988); *Ralph C. Wilson Indus., Inc. v. Chronicle Broadcasting Cos.*, 794 F.2d 1359 (9th Cir. 1987); *Satellite Television*

Paddock particularly avoids the one federal case that considered exclusive licenses of copyrighted material identical to those at issue here and similarly held that the exclusivity promoted, rather than harmed, interbrand competition by forcing competing newspapers to contract with different suppliers, thus "guarantee[ing] that the reading public has access to a wider variety of news reporting and opinions." [20] There too the plaintiff alleged that because the defendant's news service was "unique," the exclusive subscription was anticompetitive. But the court rejected that argument, in view of the fact that other sources of news stories were plainly available.[21] Moreover, in response to the plaintiff's contention (reminiscent of Paddock's here) that the exclusive arrangement harmed consumers by preventing them from reading the same stories in more than one newspaper, the court explained that the effect described was merely a restriction on intrabrand competition that was more than outweighed by the li-

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714 F.2d 351; *Soffer v. National Amusements, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,286 (D. Conn. 1996); *Northeastern Educ. Television of Ohio, Inc. v. Educ. Television Assoc. of Metro. Cleveland*, 758 F. Supp. 1568 (N.D. Ohio 1990); *Determined Productions, Inc. v. R. Dakin & Co.*, 514 F. Supp. 645 (N.D. Cal. 1979), *aff'd mem.*, 649 F.2d 866 (9th Cir. 1981); Areeda, *supra* note 7, ¶ 1653a at 578 (1989) (reviewing lower court cases applying the rule of reason to exclusive distribution agreements and noting that "[i]llegality has seldom been found, and judgment has frequently been given for the manufacturer at the pleading or summary judgment stage").

[20] *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Serv.*, 616 F. Supp. 502, 511 (D. N.J. 1985), *aff'd mem.*, 791 F.2d 924 (3d Cir. 1986). In *Woodbury*, a local New Jersey newspaper challenged the exclusive license held by the *Philadelphia Inquirer* to the one of the two supplemental news services that is also a defendant in this case.

[21] *See id.* (observing that "the [plaintiff] is free to write its own articles on the same subjects or, as a less costly alternative, to contract with [the] other supplemental news services which do exist").

censes' manifest stimulus to interbrand competition.[22] Accordingly, having expressly applied the Rule of Reason,[23] the court ruled that the plaintiff was not entitled to a further hearing of its claims on the merits, a result that is fully consistent with the Seventh Circuit's decision in this case and plainly does not reflect the adoption of a per se rule of legality for all vertical restraints.

Paddock's sole basis for claiming that the Court of Appeals' decision creates a conflict with other federal circuits is a sentence in a Third Circuit opinion[24] which sets forth the unremarkable proposition that "[w]hether a business arrangement unreasonably restrains trade is to be determined by the courts, on a case-by-case basis, using a rule of reason. . . ."[25] But in *Orson*, as here, the Third Circuit affirmed the district court's conclusion, without evidentiary hearing, that although the exclusive arrangements at issue "reduced intrabrand competition to some degree," (i.e., by preventing the plaintiff-movie theater from showing any first-run films its competitor had licensed), "they undeniably promoted interbrand competition by requiring [the plaintiff] to seek out and exhibit the films of other distributors."[26] Moreover, as was the case below, the court explained that "the indisputable existence of alternative sources of supply for the plaintiff

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[22] *Id.*

[23] *Id.* at 506 (observing that "[i]n judging concerted action on vertical nonprice restraints, the rule of reason standard applies").

[24] *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996).

[25] P. App. 8 (quoting *Orson*, 79 F.3d at 1367).

[26] *Orson*, 79 F.3d at 1399. *See also Northeastern Educ. Television*, 758 F. Supp. at 1477-78 (concluding that exclusive agreement between programming supplier and television station had increased interbrand competition by forcing other stations to go to alternative suppliers and that "[f]rom the television viewer's perspective, it is equally clear that the [exclusive license] increases the diversity of programming available to the viewing public").

negates the existence of anticompetitive effects in this case." [27] Because it was apparent from the record that the plaintiff had been able to obtain films from other distributors for its theaters—even if they were not its first choices—the court concluded that the exclusivity "did not produce the anticompetitive effects the Sherman Act was designed to prevent." [28]

Thus, contrary to Paddock's assertions, *Orson* actually *supports* the Seventh Circuit's opinion in this case. As both courts properly recognized, so long as alternative supplies exist, even if they are less attractive than materials made unavailable through an exclusive license, the antitrust laws do not provide a remedy to secure whatever resources a plaintiff may claim to be required for "effective competition."

The Seventh Circuit's opinion is fully consistent both with this Court's previous decisions in vertical restraint cases and with the decisions of courts in other circuits considering the legality of exclusive licenses. There is no conflict here.

III. THIS COURT'S DECISION IN *MOTION PICTURE ADVERTISING* IS INAPPLICABLE TO THE FACTS OF THIS CASE

Perhaps recognizing the frailty of its first two arguments, Paddock attempts to attract this Court's notice by presenting a third ground for review: *viz.* that "[i]n defending its new per se rule the Seventh Circuit rejected this Court's decision in *Motion Picture Advertising*" and

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[27] *Orson*, 79 F.3d at 1372.

[28] *Id.* at 1372 (observing that "the touchstone" of a rule of reason analysis is the challenged practice's "competitive effects"); *see also Ralph C. Wilson*, 794 F.2d at 1363 ("[b]efore we need to determine whether the [executive licenses] challenged by appellant are unreasonable restraints of trade, the appellant must show that [the licenses] injured or decreased competition").

described that opinion as "a derelict." (Pet. 10.) Paddock misstates not only the Seventh Circuit's language but also its holding. Far from rejecting this Court's analysis in *Motion Picture Advertsing,* the Seventh Circuit merely affirmed the district court's finding that that decision does not apply to the facts of this case, and went on to determine that even if it did, the exclusive licenses at issue here would be upheld.

Paddock's principal argument on appeal was that the district court erred by not applying this Court's analysis in exclusive dealing cases to its allegations concerning the exclusive licenses held by the *Tribune* and the *Sun-Times.* According to Paddock, under the case law applicable to such arrangements—in particular, this Court's opinion in *Motion Picture Advertising*—the aggregate effects of the *Tribune*'s and *Sun-Times*' exclusive licenses can constitute the antitrust injury necessary to make out a violation under section 1.

The Seventh Circuit correctly rejected this argument. At the outset, it noted that the quantitative foreclosure of *Motion Picture Advertising*—which depends upon the percentage of sales "foreclosed" to competitors "without proof of injury to consumers—reflects a bygone day in antitrust analysis." [29] Nevertheless, contrary to Paddock's charac-

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[29] In *Standard Oil Co. v. United States,* 337 U.S. 293 (1949) this Court adopted an approach for determining whether the foreclosure of a market by an exclusive dealing arrangement was "substantial," and therefore illegal, that focused almost entirely on the percentage of the market tied up as a result of the arrangement. Richard M. Steuer, *Exclusive Dealing in Distribution,* 69 Cornell L.Rev. 101, 106 (1983). It came to be known as the "quantitative substantiality" test. *Id.* However, in *Tampa Elec. Co. v. Nashville Coal Co.,* 365 U.S. 320, 329 (1961), this Court indicated that the appropriate focus in such cases was rather on "the probable effect of the contract on the relevant area of effective competition." Since then, lower courts have utilized an approach in which the percentage of the outlets foreclosed is but one of a number of factors considered in determining whether an exclusive dealing contract unrea-

terization of the opinion, the Seventh Circuit concluded that the district court "properly *did not rely* . . . on a belief that [*Motion Picture Advertising*] is a derelict," but rather held for three reasons that that case "is not controlling even if it remains authoritative." (P. App. 8.)

First, *Motion Picture Advertising* was decided under § 5 of the FTC Act which, as this Court noted, grants the Federal Trade Commission authority to forbid practices that endanger effective competition, even if they do not violate the Sherman Act.[30] While the Seventh Circuit acknowledged this Court's observation in that case that "a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act," it determined that the statement was dictum and noted, correctly, that "[n]o subsequent case has read *Motion Picture Advertising*[] to abolish the requirement of concerted action under § 1 of the Sherman Act."[31] Paddock has supplied no citations to the contrary.

Second, *Motion Picture Advertising* addressed exclusive dealing practices, while this case involves exclusive distributorships. (P. App. 9.) Exclusive dealing contracts obligate a firm to purchase all its inputs from a single source—just as the theaters in that case were committed to one distributor for all their advertising films.[32] As the

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sonably restrains trade. *See Barr Lab., Inc. v. Abbott Lab.*, 978 F.2d 98, 111 (3d Cir. 1992); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984).

[30] *See* 344 U.S. at 394 ("[t]he 'unfair methods of competition,' which are condemned by § 5(a) of the Act are not confined to those that were illegal at common law or that were condemned by the Sherman Act.")

[31] P. App. 9 (quoting 344 U.S. at 395).

[32] P. App. 9. *See also* Steuer, *supra* note 29, at 102 (exclusive dealing "is a vertical restriction that a supplier imposes on a cus-

Seventh Circuit pointed out, these kinds of arrangements properly raise concerns about foreclosure because, if they are widespread, they may preclude a new supplier from obtaining outlets for its products.[33]

By contrast, the Court explained, exclusive distributorships—the kinds of contracts at issue here[34]—"do[] not restrict entry at either [the supply or distribution] level." (P. App. 10.) Neither the *Tribune* nor the *Sun-Times* has committed to purchase all its news or features from a single source—so a new entrant in the supply of these materials is not foreclosed from selling to either of them. Accordingly, the Court rightly concluded that " '[f]oreclosure' of the kind about which *Motion Picture Advertising* was concerned does not occur under exclusive distribution contracts."[35]

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tomer, forbidding the customer from purchasing some category of products from any other supplier").

[33] P. App. 9. *See also* Stanley L. Ornstein, *Exclusive Dealing and Antitrust*, 34 Antitrust Bull. 65, 85 (1989) ("the threat from exclusive dealing is . . . in foreclosing the retail market to incumbent manufacturers, laying the foundation for manufacturer collusion or a dominant firm monopoly"); *Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1293 (4th Cir.) ("what has concerned the courts about exclusive dealing arrangements is the possibility that a single manufacturer will control all or a substantial number of the available retail outlets"), *cert. denied*, 484 U.S. 827 (1987).

[34] Paddock attempts to distinguish this holding by arguing (for the first time) that "the exclusive licenses involved in this case are not distributorships but exclusive supply contracts." Pet. 11 n.3. However, as discussed above, the licenses granted to the *Sun-Times* and the *Tribune* contain no commitment by either paper to obtain its supplier of news or features exclusively from one source. Moreover, as explained in the preceding section, other courts considering exclusive licenses of copyrighted material like those at issue here have consistently viewed them as a form of exclusive distributorship. *See* note 7 *supra*.

[35] P. App. 10. *See also* Areeda, *supra* note 7, ¶ 1600 at 6 & n.10 (explaining with respect to a supplier's decision to make a dealer

Finally, far from "refusing to follow" this Court's decision in *Motion Picture Advertising*, the Seventh Circuit concluded that even if that opinion were applicable to the facts of this case, the exclusive licenses would be lawful because their terms are of short duration. It pointed out that both the FTC and this Court determined that "even exclusive dealing contracts are lawful if limited to [terms of] a year[]," in apparent recognition of the fact that "exclusivity can promote competition by making it feasible for firms to invest in promoting their products," and that "with one-year contracts, the entire market is up for grabs."[36] The Court then noted that "[t]hings work similarly in the newspaper business": "[c]ontract terms are short, so competition for the contract can flourish." (P. App. 10.) In the interim, exclusive licenses serve the procompetitive purposes of helping the subscribing paper "distinguish itself from, and compete with, its rivals" and of protecting its investment in the licensed material: "[t]he *Sun-Times* will not promote a readership for a particular columnist if the *Tribune* and the *Herald* carry the same column" because free-riding would dilute the value of its efforts. (P. App. 11.)

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his "sole outlet" or "exclusive distributor" in a designated area, "that this exclusiveness differs from that which makes a particular manufacturer a dealer's sole supplier," and emphasizing that "[a]lthough a sole outlet agreement necessarily deprives other would-be dealers of access to a supply of that manufacturer's brand, it does not ordinarily raise the concerns associated with preempting suppliers"); Steuer, *supra* note 29, at 114 ("[a] proper analysis of exclusive dealing must use a different approach from that used in analyzing [. . . other vertical restraints], because exclusive dealing creates significantly different procompetitive and anticompetitive effects"); *Satellite Television*, 714 F.2d at 355 (distinguishing between exclusive distributorship or territory provisions "and [e]xclusive requirement [or dealing] contracts" and noting that in the main the former "have been sanctioned because the effected increase in interbrand competition has outweighed the decrease in intraband competition").

[36] P. App. 10 (citing *Motion Picture Advertising*, 344 U.S. at 395-96).

Paddock protests that the exclusive licenses it challenges do not in fact end at the expiration of their terms, but are continually renewed. However, as the Seventh Circuit rightly pointed out, the FTC decision upheld by this Court in *Motion Picture Advertising* "did not insist that dealings between a distributor and a theater *cease* after a year; the parties were free to renew their arrangement for successive years; it was enough that there be an option to change distributors or renegotiate once a year." [37] Indeed the Court observed, "for all we can tell renewal was (and remains) the norm in the motion picture business." [38] In view of their short terms, the licenses clearly afforded Paddock all that *Motion Picture Advertising* requires: *i.e.*, the opportunity to "try to outbid the *Tribune* and the *Sun-Times* in the marketplace." [39]

Thus, notwithstanding Paddock's use of misquoted language to suggest the contrary, the Seventh Circuit did not ignore this Court's decision in *Motion Picture Advertising*. Rather, it affirmed the District Court's conclusion that the analysis in that case was inapplicable here to the exclusive licenses held by the *Tribune* and the *Sun-Times* and, even if applied, would not have resulted in their condemnation.[40]

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[37] *Id.; see also* P. App. 12 ("[t]he FTC and the Supreme Court . . . wanted to ensure that dealings continued only while they remained in the interests of both distributors and theaters—which meant that someone else could come along with a better deal and get the business").

[38] P. App. 11 (observing further that "[a]s long as arrangements serve the interests of both parties, they will continue, whether that means signing another in a series of one-year contracts or declining to exercise an annual option to cancel a contract").

[39] P. App. 12.

[40] Paddock's last argument is that "the Seventh Circuit ignored the allegations of Paddock's complaints and relied on factual presuppositions unsupported by the record." (Pet. 14.) On the contrary, the Court carefully considered Paddock's allegations in light

CONCLUSION

The petition for a writ of certiorari should be denied.

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of the applicable precedents and determined that dismissal was appropriate because Paddock had failed adequately to allege the requisite antitrust injury. In any event, Paddock's arguments relate solely to factual issues in the court below, which do not warrant this Court's review. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

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In The

Supreme Court of the United States

October Term, 1996

PADDOCK PUBLICATIONS, INC.,

Petitioner,

v.

CHICAGO TRIBUNE COMPANY, CHICAGO SUN-TIMES, INC., NEW YORK TIMES SYNDICATION SALES CORPORATION, LOS ANGELES TIMES/ WASHINGTON POST NEWS SERVICE, INC., TRIBUNE MEDIA SERVICES, INC., CREATORS SYNDICATE, KING FEATURES SYNDICATE, INC. TIMES MIRROR COMPANY d/b/a LOS ANGELES TIMES SYNDICATE, UNITED MEDIA, and UNIVERSAL PRESS SYNDICATE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner Paddock Publications, Inc. ("Paddock") submits this reply to the Brief of Respondents in Opposition ("Br.Opp."). All of respondents' contentions are contradicted by one undeniable reality: Applying its economic theory, the Seventh Circuit held that the exclusive vertical licenses in question had to be undertaken to maximize profits and so could not violate Section 1 of the Sherman Act, 15 U.S.C. § 1. By affirming dismissal under Rule 12(b)(6), F.R.Civ.P., of a complaint that alleges with particularity all the elements of a Rule of Reason case under Section 1, the Seventh Circuit has created a new principle of *per se* legality for such vertical agreements. The Court of Appeals reached its result by presupposing "facts" that are contradicted by the allegations of Paddock's complaints and evidence submitted in opposition to respondents' alternative motion for summary judgment. Both the Seventh Circuit's result and the method by which it reached that result demand review and reversal by this Court.

I. THE SEVENTH CIRCUIT ADOPTED AN UNPRECEDENTED RULE OF PER SE LEGALITY FOR EXCLUSIVE VERTICAL SUPPLY CONTRACTS

Respondents contend that the District Court and the Seventh Circuit, far from creating a new principle that vertical exclusive licenses are virtually always legal, merely applied the Rule of Reason and concluded that Paddock had "failed to allege any cognizable anticompetitive effects from the exclusive licenses at issue." Br.Opp. 4-5. In fact, the District Court explicitly stated that it had *not* applied the Rule of Reason, App. 85 n. 13, and the Seventh Circuit did even mention the Rule of Reason in its opinion. Moreover, it is unquestionable that

Paddock has alleged specific anticompetitive effects of the licenses:

> The exclusive licenses obtained by the *Tribune* and the *Sun-Times* from the other defendants have adversely affected consumers, advertisers, and competition in the Chicago Area Market by:
>
> (a) creating unnatural barriers to entry into the Chicago Area Market by denying the *Daily Herald* and other potential competitors access to supplemental news services and features necessary for a full and effective entry into that market and the ability to compete with the *Tribune* and the *Sun-Times*;
>
> (b) lessening the supply of news, opinions, and features available to readers in the Chicago Area Market;
>
> (c) preventing competition among the *Daily Herald*, the *Tribune* and the *Sun-Times* that would exist but for readers' desire to obtain news reports and features in their newspaper that are not available to the *Daily Herald* due to the defendants' exclusive agreements;
>
> (d) depriving readers of the *Daily Herald* who do not wish to buy more than one general interest newspaper access to popular features which they could obtain through the *Daily Herald* but for the exclusive agreements; and
>
> (e) preventing further competition for advertisers in the Chicago Area Market that would exist if the *Daily Herald* were unhindered by the exclusive agreements. App. 110-111.

Plainly, Paddock's case was not and could not be dismissed for failure to plead injury to competition and consumer welfare. The exclusive licenses maintain the Tribune's and Sun-Times' market power, limit the amount of competition and newspapers sold, create disincentives

for innovation and creativity, and allow the dominant newspapers to maintain prices higher than competitive levels.

To the contrary, the Seventh Circuit's decision is undeniably based on *per se* legality, and that fact is demonstrated by respondents' own description of the Seventh Circuit's ruling. Respondents explain that the Seventh Circuit's decision is founded on three holdings: (1) that the licenses in question serve "procompetitive purposes"; (2) that the licenses constitute "a form of exclusive distributorship"; and (3) that the shortness of the licenses' terms offered Paddock the opportunity to compete. Br.Opp. 4. But these are all disputed factual issues. The Magistrate Judge, who unlike the District Court and Court of Appeals, actually examined Paddock's evidence in recommending denial of respondents' alternative motion for summary judgment, found the procompetitive justifications offered by respondents to be "pure speculation."[1] App. 50. He flatly rejected the idea that the exclusive licenses create exclusive distributorships. App. 35-40. Paddock also submitted abundant evidence, from respondents' own witnesses, that the system of licensing actually in practice in this country does not re-open the licenses for bidding after the initial term has expired. App. 202, 210-213, 216-220, 228-230, 243-249, 271. As one of respondents' witnesses explained:

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[1] Respondents state that "the Seventh Circuit was able to *discern* only procompetitive effects" of the licenses on interbrand competition. Br.Opp. 8 (emphasis added). On the basis of what? Certainly nothing in the complaint, amended complaint, or summary judgment record supports such a conclusion. The Seventh Circuit was instead making a legal holding that such licenses are always procompetitive regardless of the facts.

> What we do is we enter into an agreement, an exclusive agreement, and say for instance that it's 30 days. Somebody has to actively cancel that contract in order for it to change. We would not as a normal practice if a feature becomes popular go in and cancel a contract on anybody that has bought the feature unless there was some very unusual circumstances. It has been very few times in the industry. App. 211.

If, as respondents claim, the Seventh Circuit had applied the Rule of Reason in this case, then it was a novel "no look" version; it was plainly not the "full look" or "quick look" applications of the Rule of Reason that this Court has developed.[2] Instead, the Court of Appeals followed Judge Easterbrook's lead and adopted as law his long-held views that the Rule of Reason should be scrapped and that vertical agreements are virtually always legal. Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 168 (1984); Frank H. Easterbrook, *The Limits of Antitrust* 63 Tex.L.Rev. 1 (1984).[3]

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[2] *See NCAA v. Bd. of Regents*, 468 U.S. 85, 104-113 (1984); *Chicago Professional Sports Ltd. Partnership v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996).

[3] Respondents merely repeat the Seventh Circuit's non sequitur that because the exclusive licenses in question would not violate the "essential facility" doctrine they also cannot violate the Rule of Reason. Br.Opp. 7. The two antitrust rules have completely different elements. *See, e.g., U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1353, 1368-1369 (2d Cir. 1988). While the essential facility doctrine deals with a monopolist's control of a "bottleneck" facility, this case involves restraints created by contracts between the dominant newspapers and the major suppliers of news service material and features. As the Magistrate Judge observed, there is no

II. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

Respondents focus on two cases to attempt to show that the Seventh Circuit's refusal to apply the Rule of Reason is consistent with decisions of other Circuits. Br.Opp. 10-13. They could not have selected more inapt examples. Both were summary judgments, not Rule 12(b)(6) dismissals, and both turned upon the facts, not *per se* legality.

In *Woodbury Daily Times Co. v. Los Angeles Times-Washington Post News Service, Inc.*, 616 F. Supp. 502 (D.N.J. 1985), *aff'd without opinion*, 791 F.2d 924 (3d Cir. 1986), the plaintiff newspaper did not even claim that the exclusive news service license in question injured competition but instead the exact opposite: that the plaintiff was *not* in competition with the Philadelphia Inquirer which held that license. 616 F. Supp. at 506. Furthermore, the plaintiff complained about its inability to obtain the Los Angeles Times/Washington Post News Service because of the exclusive license held by the Inquirer even though the New York Times News Service was available. *Id.* at 511. The plaintiff made no showing of why the New York Times News Service would not be an adequate substitute. *Woodbury* turned on the factual record developed by the parties in that case and cannot be stretched to fit the very different facts of this case. Paddock alleges that it cannot obtain the New York Times News Service or the Los

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natural bottleneck here: "[I]nformation can be replicated indefinitely; nonexclusive licensing poses no logistical problems." App. 58.

Angeles Times/Washington Post News Service *because the Daily Herald is in competition* with the Tribune and Sun-Times, and there are no adequate substitutes available to Paddock. The Magistrate Judge found *Woodbury* inapplicable here. App. 44-47.

The decision in *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1372 (3d Cir. 1996), also turned entirely on the facts: The Third Circuit concluded that the plaintiff theater "failed to present sufficient evidence to support its claim. . . . " The Court stressed that the record showed that it was "the indisputable existence of alternative sources of supply . . . which negates the existence of anticompetitive effects in this case." *Id.* Here, Paddock does have the evidence to back up its claim that it does not have access to news services and features of sufficient quality to enable it to compete with the Tribune and Sun-Times. App. 145-146, 153, 156, 159-160, 194-196. However, under the decisions below, Paddock will never have the opportunity to offer such evidence.

The only case cited by respondents (in a footnote, Br.Opp. 10 n. 19) in which an antitrust claim was dismissed under Rule 12(b)(6) is *Futurevision Cable Sys. of Wiggins v. Multivision Cable TV Corp.*, 789 F. Supp. 760 (S.D.Miss. 1992), *aff'd without published opinion*, 986 F.2d 1418 (5th Cir. 1993), but the complaint there did not claim that the exclusive licenses in question had blocked the plaintiff cable television system operator from obtaining vital programming. The plaintiff cable system had access to all cable programs except The Learning Channel and ESPN Sunday Night Football and did not allege that it lacked adequate substitutes even for those programs. 789 F. Supp. at 769-771. The plaintiff even admitted in its complaint that it had achieved "remarkable success in securing cable subscribers. . . . " *Id.* at 769.

The other Circuits, therefore, have not adopted the Seventh Circuit's *per se* rule of vertical legality. They have instead taken the old-fashioned approach of giving complaint allegations and facts real significance under the antitrust laws.

III. THE SEVENTH CIRCUIT ERRED BY REFUSING TO FOLLOW THIS COURT'S DECISION IN *MOTION PICTURE ADVERTISING*

In addition to echoing the Seventh Circuit's invalid effort to denigrate and distinguish this Court's decision in *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), respondents contend that *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), marked a change in the approach to exclusive dealing that placed less stress on market foreclosure. Br.Opp. 14 n. 20. *Tampa Electric*, however, did not in the least bit undermine *Motion Picture Advertising*. This Court in *Tampa Electric* adopted an approach very similar to the Rule of Reason for evaluating exclusive dealing arrangements under Section 3 of the Clayton Act, 15 U.S.C. § 14, and specifically pointed out the significance of "an industry-wide practice of relying upon exclusive contracts. . . . " 365 U.S. at 334.

Respondents (as well as the District Court and Court of Appeals) glaringly fail to offer any reason why it should not be significant under the Rule of Reason that the two dominant newspapers in the Chicago market, each with market power, use similar exclusive dealing contracts to suppress competition, and the aggregate effect of the exclusive agreements has achieved the anti-competitive purpose of foreclosing competition from the Daily Herald. Respondents cite no authorities supporting the Seventh Circuit's refusal to consider the aggregate

anticompetitive effects of the major firms' exclusive contracts in deciding whether they violate the Rule of Reason.

Respondents rely heavily on the Seventh Circuit's extraordinary conception that the newspapers should be deemed "distributors" of the news services and features they license. Br.Opp. 15-16. Yet they ignore the fact, demonstrated conclusively in the Petition at 22-23, that the Seventh Circuit's distributorship model contradicts the allegations of Paddock's complaint, which cannot be gainsaid on a Rule 12(b)(6) motion, as well as evidence offered by Paddock and the Magistrate Judge's conclusion that the model does not fit this case. But, ironically, the law with respect to distributorships does not help them on the aggregation issue. Respondents cite Areeda to defend the legitimacy of "sole outlet" distributorships, Br.Opp. 16-17 n. 35, but omit reference to his discussion of the great anticompetitive danger created when the major firms in a market all use the same vertical restraints:

> *Cumulative market coverage.* When used by all manufacturers, distribution restraints could severely narrow interbrand competition at the dealer level and thereby increase the restraint's attractiveness to the dealers and magnify any adverse welfare consequences the restraint might have. . . . [W]idespread coverage is a "strong" indicator of a significant likelihood that the restraint serves anticompetitive dealer interests, and even those who are sympathetic to vertical distribution restraints acknowledge that this danger increases with market coverage.

VIII Phillip E. Areeda, Antitrust Law ¶ 1604f4 (1989) at 62 (footnote omitted).

Thus, even if the record were altered to superimpose a distributorship model on the newspaper industry, the aggregation (or in Areeda's term, "cumulative") principle remains valid. More appropriate in this case, however, is Areeda's condemnation of a buyer's exclusive contract "foreclosing its rivals from needed supplies in order to obtain or reinforce its own power. . . . " *Id.*, ¶ 1652c, at 572-573. The exclusive licenses here are designed to foreclose the Daily Herald from needed supplies and preserve the duopoly in the Chicago area newspaper market.[4]

IV. THE SEVENTH CIRCUIT VIOLATED RULE 12(b)(6) BY RESTING ITS DECISION ON FACTUAL PRESUPPOSITIONS CONTRARY TO THE CRUCIAL ALLEGATIONS OF THE COMPLAINT

Respondents refuse to address the significance of the Seventh Circuit's reliance on its own outside-the-record factual determinations in affirming a Rule 12(b)(6) dismissal. Paddock does not ask the Court, as respondents contend (Br.Opp. 18-19 n. 40), to decide factual issues. Instead, Paddock asks the Court to reverse the Seventh Circuit because it disdained the federal judicial process and dismissed this case on the basis of the panel's personal beliefs about competition in the newspaper industry rather than the well-pleaded facts and the record. The

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[4] Respondents' contention (Br.Opp. 16 n. 34) that Paddock described the exclusive licenses for the first time in its Petition as exclusive supply contracts is completely wrong. Paddock has always viewed the news services and features in question as vital ingredients of a general interest newspaper. App. 95, 100, 105, 110-111, 121, 129. The Magistrate Judge reached the same conclusion after examining the evidence. App. 35-40.

Seventh Circuit simply did not believe Paddock's factual allegations of injury to competition and thus threw the case out without first requiring the District Court to examine the evidence and make the necessary findings. Rather than assume the facts alleged in Paddock's complaint to be true, the Seventh Circuit found its own facts. Although inappropriate in any case, this approach is particularly perverse in an antitrust case. This Court has never deviated from its insistence that antitrust cases be decided on their particular facts. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466-467 (1992). The Seventh Circuit's handling of this case cannot be countenanced under basic concepts of fairness to a litigant.

CONCLUSION

This case presents the Court with fundamental issues under the antitrust laws and the Federal Rules of Civil Procedure. Accordingly, Paddock asks the Court to grant the Petition, reverse the decision below, and remand this case for the trial to which Paddock is entitled.

Respectfully submitted,

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